

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
BRIEF**

75-7241

United States Court Of Appeals
Second Circuit



James C. Gabriel, Pro Se,

75-7241

Objectant-Appellant,

-against-

Betty Levin, Alleghany Corporation
and Robert LeVasseur,

Plaintiffs-Appellees,

and

Mississippi River Corporation,
Missouri Pacific Railroad Company,
Robert H. Craft, T.C. Davis and
Thomas F. Milbank, as Defendants-Appellees.

Supplemental
Brief For James C. Gabriel, Pro Se, .

Objectant-Appellant

On Appeal From The United States District Court
For The Southern District Of New York

James C. Gabriel, Pro Se, Objectant-Appellant
P.O. Box 94
Sea Girt, New Jersey 08750
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Interstate Commerce Commission
Washington, D.C. 20423

I, ROBERT L. OSWALD, Secretary of the INTERSTATE
COMMERCE COMMISSION, do hereby certify that the attached is a
true copy of the Report Of The Commission, Submitted July
1954, Decided July 29, 1954, (pages 477, 492, 597, 598, 599, 600
& 665) in Docket No. F. D. 9918, Missouri Pacific Railroad
Company Reorganization, the original of which is now on file
and of record in the office of said Commission.



IN WITNESS WHEREOF I
hereunto set my hand
affixed the Seal of
Commission this 23rd
of September, A. D.

Robert L. Oswald
SECRETARY OF THE INTERSTATE
COMMERCE COMMISSION

FD 8952
FINANCE DOCKET No. 9918

MISSOURI PACIFIC RAILROAD COMPANY REORGANIZATION

Submitted July 6, 1954. Decided July 29, 1954

Upon supplemental record made at reopened hearings held pursuant to the provisions of paragraph (b) of section 208, title 11, U. S. Code, and section 77, of the Bankruptcy Act, as amended, plan of reorganization for the Missouri Pacific Railroad Company, and others, debtors, modified and approved.¹

Appearances as in prior reports and, in addition, *Arthur Arsham, Harold Brown, Walter H. Brown, Jr., Carl B. Callaway, Allan F. Gill, Joseph A. Doyle, Felix A. Fishman, Edward L. Friedman, Jr., Emanuel Gruss, Edward J. Hickey, Jr., John P. Humes, Percival E. Jackson, Jerome M. Kirshbaum, Ferdinand H. Kolvoord, Alan S. Kuller, Frederick M. Myers, Jr., Eldon S. Olson, William P. Palmer, David M. Potts, Thomas J. Sheehan, Jr., John Ben Shepperd, Alfonso E. Solanas, Henry I. Stimson, Alfred B. Teton, Jay W. Tracey, Jr., and Lionel E. Zunz.*

SEVENTH SUPPLEMENTAL REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed to the report proposed by members of the staff of our Bureau of Finance. Thereafter, the bankruptcy trustee, acting pursuant to authorization and direction of the United States district court of jurisdiction in these proceedings, filed with us a petition accompanied by a stipulation and agreement, executed by a majority of the parties in interest, embracing certain modifications of the proposed-report recommendations, which, if adopted, would be acceptable to the parties signatory to the stipulation and agreement as an agreed system plan. Our conclusions differ somewhat from those contained in the proposed report.

Request for oral argument on exceptions was made by the independent directors of the Missouri Pacific Railroad Company, debtor. Similar requests made by the Alleghany Corporation, owner of approximately 49 percent of Missouri Pacific common stock, and Oscar Gruss & Son, holders of International-Great Northern Railroad Company adjustment-mortgage bonds, were later withdrawn, with the res-

¹ For previous reports see 239 I. C. C. 7; 240 I. C. C. 15; 257 I. C. C. 479 and 745; 275 I. C. C. 59 and 203; and 282 I. C. C. 629.

290 I. C. C.

date, on 30 days' notice, at their principal amount plus all interest then due and payable thereon.

(b) *New equity issues.*—In lieu of the issue of a \$100 par-value preferred stock and 1 class (A) of no-par-value common stock (exclusive of possible issue of a class B stock upon exercise of warrants issuable to old common-stock holders) recommended in the proposed report, the stock of the reorganized company would consist of 2 classes of common stock, designated A and B, both of which would be without par value and would have full voting rights. Each share of class A stock would have a stated value of \$100, and each share of class B stock would have a stated value of either \$100 or \$50, to be determined by the Commission.

(c) *Class A common stock.*—Dividends on this class of new common stock would be limited to either \$5 or \$4 per share in a calendar year, as the Commission shall determine, irrespective of what amounts may have been paid on class B common stock. Dividends on class A stock would be noncumulative, and none would be paid in the form of stock or notes or in any form other than cash or its equivalent. Class A stock would be nonconvertible, and in the event of dissolution, winding up, or liquidation of the company, the holders of this class of stock would be entitled to receive out of the assets of the company \$100 per share before a distribution is made to holders of class B stock, who thereafter would be entitled to any further distributions out of the assets of the company, without further participation by holders of class A stock.

The total stated value of class A common stock, \$201,824,761, recommended in the proposed report, would be reduced to \$191,755,818 in order to (a) eliminate the amount of \$3,561,339 which was thereunder allocated to the Missouri Pacific secured serial bonds and \$293,639 allocated to the New Orleans publicly held stock and (b) take account of the reduction of \$6,213,465 in the allotment to International adjustment mortgage bonds as set forth in paragraph (g) hereof.

(d) *Class B common stock.*—This class of new common stock, having a total stated value of \$4,065,717, would be issued only to holders of Missouri Pacific common stock on a basis of 1 share of new, of a stated value of \$100 per share, for each 20 shares of old stock, or, in the alternative, in the discretion of the Commission, 1 share of new, of a stated value of \$50 per share, for each 10 shares of old stock.

No dividends could be declared on class B common stock in any calendar year unless, during that year, dividends of \$5 or \$4 (whichever is prescribed by the Commission) have been paid or set apart for payment on the class A common stock; but there would be no other restriction on amount of dividends which may be declared and paid on the class B stock.

interest before any distribution is made to the stockholders. Since the problem here under consideration involves the distribution of securities representing dividends to the preferred-stock holders before carrying any surplus to the next junior security, it comes within the scope of the exception, for the debtor must be considered as solvent insofar as the preferred stock is concerned. We find that this contention is without merit.

We conclude that we should approve, as fair and equitable, the distribution to the old preferred-stock holders of new class A common stock in the amount of 1 share for each \$100 par value of the preferred stock and for each \$100 of accumulated dividends.

The 1949 plan provided, among other things, that the new class A stock should be entitled to dividends of 5 percent in any year before any dividends are paid or declared and set apart for payment on the class B stock. It also provided that, after dividends of \$5 have been paid or declared on both class A and class B stock, the former should participate equally, share for share, with the latter in any further dividends. The examiners did not recommend any change in these provisions.

Under the agreed plan, we must determine whether the class A stock should be entitled to dividends annually at \$4 or \$5 per share, and the participation feature provided in the 1949 plan would be eliminated. Considering the nature of this class A stock, and the statements of earnings elsewhere in this report, we have no doubt that it should be entitled to dividends of 5 percent in any year before the class B stock receive any dividends. A lesser rate would not, in our opinion, fully compensate the old preferred-stock holders. The participation feature of this stock was incorporated in the 1949 plan to insure some compensation for possible failure to receive dividends in some years. But under the agreed plan these stockholders also will obtain control of the reorganized company. Appraisal of such control is difficult, but it is our view that it will afford some support for the price of the class A stock. Since the old preferred-stock holders receive new class A stock for the entire amount of the par value held plus unpaid dividends, we conclude that the participation feature of the latter is not necessary for compensation in full. Similarly, the rights of the class A stockholders upon liquidation should be limited to \$100 per share, eliminating the liquidation participation provided for this stock in the 1949 plan. We find that the above-described distribution to the old preferred-stock holders of new non-cumulative nonconvertible no-par-value class A stock entitled to \$5 dividends annually, and to receive upon liquidation \$100 per share out of the assets of the reorganized company, would be fair and equitable and would compensate them fully for the rights surrendered.

Modification of the class A stock.—Under the agreed plan, the new class A stock would be noncumulative and nonconvertible and dividends would be limited to \$4 or \$5 per year as we may decide, without further participation in earnings. We herein have concluded in our discussion of the treatment of the old preferred-stock holders that a dividend rate of \$5 was necessary to compensate them for their rights. We also concluded that we should approve the elimination of the participation feature provided for this stock in the 1949 plan.

The agreed plan further would require that the certificate of incorporation of the new company provide that the company shall not alter or change the rights of the holders of either class A or class B stock, or authorize the issue of additional shares of either class of stock or of any other class, or of participating or convertible preferred stock, without the consent of the holders of at least a majority of the number of shares of common stock of each class at the time outstanding.

The groups contend that the provision of the agreed plan eliminating the new preferred stock places control of the new company in the new class A stock although the fact that such stock is noncumulative and nonconvertible would result in entire loss of income by the holders in years of low earnings and a resulting low market price for the stock. Such a type of voting security, they assert, would not promote the selection of the best, or a stable management, and they point out that the holders of the new first-mortgage bonds would be vitally interested in a stable and capable management. Considering the estimates of earnings upon which the examiners based their recommendations, we do not attach material significance to this criticism. We believe it impossible to reorganize the debtors in a manner equitable to all classes of security holders under a plan which would assure the new stockholders of a return in every year. This objection to the agreed plan is not sustained.

In accordance with our hereinbefore-stated findings, we conclude that the 1949 plan provision for class A common stock should be modified so that the annual dividends would be limited to \$5 in any year, without further participation in earnings in the same year. Provision for this stock should be further modified so that upon dissolution, winding up, or liquidation of the new company, it would be entitled to receive out of the assets of the company only \$100 per share, such distribution to be prior to any distribution to the class B stockholders. The limitation upon the issue of additional stock or the change of the rights of stockholders should be modified to conform to the agreed plan.

Modification of the class B common stock.—Under the plan recommended by the examiners, no class B common stock would have been

issued until the exercise of warrants, under prescribed conditions, by the old common-stock holders of Missouri Pacific. Under the agreed plan there would be 40,657.17 shares of no-par-value class B stock of \$100 stated value, or, in our discretion, 81,314.34 shares of a stated value of \$50 per share, all to be issued to the Missouri Pacific common-stock holders on the basis of 1 share for 20 old shares, or if \$50 stock is issued, 1 share for each 10 shares of the old stock. There would be no other limitation upon the dividends which might be declared and paid on this stock.

Under the agreed plan, the earnings per share of class B stock in a year when earnings available for interest and Federal income taxes are \$57.5 million, would be, with income tax at 45 percent, \$214 before all funds; nothing after all funds when the capital fund is increased to \$11 million, and \$31.97 when the ordinary capital fund is applicable. The last two figures reflect the deduction of the three-fourths of 1 percent sinking-fund payments.

The Missouri Pacific common-stock holders' committee alludes to the large per share earnings on this stock and contends that, because of the reduction in number of shares outstanding, the public market will be destroyed and holders will be able only to sell their scrip and odd lots wherever they can find a buyer. It foresees a public distribution of less than 22,000 shares since it says that 19,600 shares will go to a single holder.²⁰ It points out that the plan would vest the equity in a class of stock having only 2 percent of the voting power, while control of the property will be in the hands of the other 98 percent. To protect the public holders of the class B stock, the committee requests recognition of them as a separate class, by the issue to them of new stock on a share-for-share basis. The circumstances recited by the committee do not, in our opinion, justify the recognition of the public holders of the new class B stock as a separate class of security holders. Some relief would be accorded them by approval of the issue of the larger number of shares of \$50 stated value stock, but the doubling of the voting power that would result, we believe, would be inequitable. The agreed plan provides 1 vote for each share of class B stock.

We conclude that we should approve modification of the class B stock provided for in the 1949 plan to conform to the agreed plan, using \$100 stated value stock and distributing to the old Missouri Pacific common-stock holders 1 share of new class B stock for each 20 shares of old stock. We find that such treatment would be fair and equitable.

²⁰ On the basis of the record before us, Alleghany Corporation would receive 1 share for each 20 shares of its holdings of 396,000 shares, or 19,800 shares.

provisions of subsection (e) of section 77 of the Bankruptcy Act, as amended, and of section 208 (b).

We conclude and find that, upon the record previously made in this proceeding and as supplemented by further hearings held pursuant to the provisions of section 208, the 1949 plan of reorganization should be modified in accordance with the findings and conclusions set forth in this report, and that as thus modified the plan will be fair and equitable and in the public interest and compatible with the provisions of section 208, title 11, U. S. Code, and of section 77 of the Bankruptcy Act. The plan so modified is hereby approved and will be certified to the United States District Court for its approval.

All requested findings and proposed modifications of the 1949 plan not specifically discussed in this report, or upon which no finding is made herein, have been duly considered, and they are found not justified to the extent that they are not incorporated in this report and in the modifications of the plan as herein approved.

An appropriate supplemental order will be issued.

MAHAFFIE, *Commissioner*, concurring in the result:

These properties have been in trusteeship for many years. Much work has been done and much expense has been incurred as a result of that fact which would not have had to be done or incurred in private management. A plan which appears to have the approval of most of those interested is now presented. This plan has been worked out and is urged in the hope that it can be made effective promptly. It greatly increases debt over the figures of the prior plan or of that proposed by the examiners. For enduring financial health a very much larger proportion of the value of the property represented by the securities issued than will be the case here must be held by owners with a right to vote, rather than by creditors. This, no matter how little of what ordinarily are considered creditors' rights, the latter possess. Under this plan the debt represented by the debentures is debt in not much more than name. Its creation, however, leaves little of value in the property to be represented by the controlling stock. This is not sound. But it is a direct result of what appears to be the national policy to put a premium on debt as against an equity interest in such properties. And that policy naturally makes for unsound capital structures. In this case the prospective saving to the company at the expense of the United States Treasury is enormous.

Another serious defect is the proposed "B" stock. This is intended to give recognition to the old common. That common has, at most, only a nuisance value if the claims prior to it are to be fully met. It is proposed to award to it only a small amount in actual par value but

to make it the residuary beneficiary of any future prosperity the property may enjoy. The prior class "A" stock is limited as to dividends and is noncumulative. It will be largely of a speculative character for some years at best. But the "B" stock is for the present, and for the foreseeable future, principally valuable as a token for speculation. Consequently, its relation to the "A" stock and to the debentures and income bonds which precede it is reasonably sure to cause trouble.

In view of these facts the problem we must face is whether the public interest in the reorganization of these properties and their return to private operation without prolonged further delay and expense outweighs the obvious defects of this agreed plan. On the whole I think it does. Accordingly, although with grave misgivings, I concur in the result.

COMMISSIONERS FREAS and TUGGLE concur in the result.

COMMISSIONER ARPAIA was necessarily absent but if he had been present he would have voted for the adoption of the report.

COMMISSIONER WINCHELL did not participate in the disposition of this proceeding.

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1, 1956, to the extent earned in the preceding calendar year. Interest shall be mandatorily payable to the extent that available net income is sufficient for the payment thereof; and all interest not paid because of this limitation shall be noncumulative. Interest on the debentures to the extent so earned in each calendar year shall become owing as a debt on December 31, in such year, even though not payable until April 1, in the next succeeding year. If, in any year, interest on the debentures is not covered by available net income, such interest may, in the discretion of the board of directors of the reorganized company, be paid out of any funds lawfully available therefor.

The debentures shall be redeemable as a whole or in part on any interest payment date, on 30 days' notice, at their principal amount plus (a) all unpaid interest earned thereon to the end of the calendar year preceding the date of redemption and (b) interest at the rate of 5 percent per annum from the end of such calendar year to the redemption date, whether or not such interest is earned. Upon maturity, whether by acceleration or otherwise, the debentures shall be entitled to (a) all unpaid interest earned thereon to the end of the calendar year preceding the date of maturity plus (b) interest at the rate of 5 percent per annum from the end of such calendar year to the date of maturity, whether or not such interest is earned. All interest on the debentures after maturity shall be a fixed obligation.

Q. New common stock; class A and class B.—The common stock of the new company shall be divided into two classes, one of which shall be designated as class A and the other of which shall be designated as class B, each of which shall be without par value but shall have a stated value of \$100 per share. The number of shares in each class to be authorized in the certificate of incorporation of the new company shall be fixed by the reorganization managers in relation to the requirements of the plan, and the number of shares in each class to be originally issued shall be in the amounts necessary to carry out the plan. The certificate of incorporation shall permit the authorization from time to time of additional shares of common stock of either class, but shall specifically provide that the new company shall not alter or change the rights of holders of either class of stock or authorize the issuance of additional shares of either class or of any other class or of participating or convertible preferred stock, without the consent of the holders of not less than a majority of the number of shares of common stock of each class at the time outstanding.

Dividends on the class A common stock shall be limited to \$5 a share in any calendar year, irrespective of the amounts which may have been paid on the class B common stock. Dividends on the class A stock shall be noncumulative and none shall be paid in the form of stock or notes or in any form other than cash or its equivalent. In any calendar year, no dividends on class B stock shall be declared or paid unless, during that year, dividends of \$5 per share shall have been paid or declared and set apart for payment on the class A stock, but there shall be no other restriction on the amount of dividends which may be declared and paid on the class B stock.

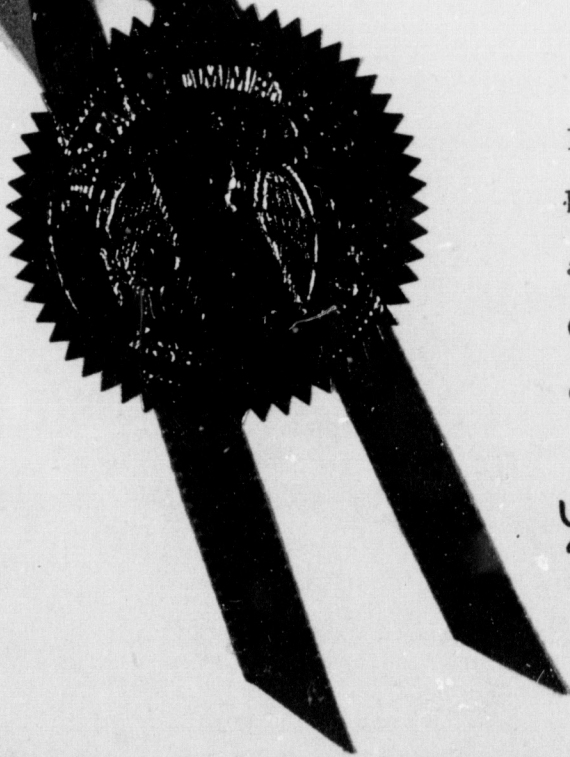
Class A common stock shall be nonconvertible, and, in the event of dissolution, winding up, or liquidation of the new company, the holders of this class of stock shall be entitled to receive out of the assets of the new company \$100 per share before any distribution is made to the holders of class B common stock, who thereafter shall be entitled to receive any further distributions out of the assets of the new company, without further participation by holders of class A stock.

Each class of common stock shall have full voting rights, and each share of stock shall entitle the holder thereof to one vote. Stockholders shall have the right of cumulative voting in the election of directors.

Interstate Commerce Commission
Washington, D.C. 20423

I, ROBERT L. OSWALD, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached is a true copy of the Report Of The Commission, decided January 27, 1970, in Docket No. MC-F-10444, Alleghany Corporation-Control And Purchase-Jones Motor Co., Inc.-And Control Erie Trucking Company, the original of which is now on file and of record in the office of said Commission.

IN WITNESS WHEREOF I have
hereunto set my hand and
affixed the Seal of said
Commission this 23rd day
of September, A. D. 1975.

A large, dark, circular seal with a serrated edge is affixed to the document. It is partially obscured by a dark, diagonal band or ribbon that runs from the left side of the page towards the bottom right. The seal itself appears to have some text or a logo in the center, but it is too dark to read clearly.
Robert L. Oswald

SECRETARY OF THE INTERSTATE
COMMERCE COMMISSION

No. MC-F-10444¹

ALLEGHANY CORPORATION—CONTROL AND PURCHASE—
JONES MOTOR CO., INC.—AND CONTROL ERIE TRUCKING
COMPANY

Decided January 27, 1970

1. In No. MC-F-10444, acquisition by Alleghany Corporation of control of Jones Motor Company, Inc., and its motor carrier subsidiary, Erie Trucking Company, through purchase of capital stock of Jones Motor Company, Inc.; and merger of a wholly owned subsidiary of Alleghany Corporation into Jones Motor Company, Inc.; and subsequently the merger of Jones Motor Company, Inc., into Alleghany Corporation for ownership, management, and operation; and acquisition by Fred M. Kirby and Allan P. Kirby, Jr., individually and as coguardians of the property of Allan P. Kirby, an incompetent, of control of the operating rights and property through the transaction, approved and authorized, subject to conditions.
2. In Finance Docket No. 25686, Jones Motor Company, Inc., authorized to issue not exceeding 100 shares of its common stock, par value \$1.
3. In Finance Docket No. 18656, previous orders of Commission vacated.
4. In No. MC-FC-70907, application dismissed.

David G. Macdonald and M. Lauck Walton for applicants.

Bernard A. Gould and Warren I. Cohn for Bureau of Enforcement.

REPORT OF THE COMMISSION

HARDIN, Commissioner:

Alleghany Corporation, a holding company with total assets in excess of \$200 million, is at present subject to dual regulation under the Investment Company Act and the Interstate Commerce Act (act). It seeks, by a series of transactions hereinafter discussed, to become a motor common carrier subject to the plenary jurisdiction of the Interstate Commerce Commission under part

¹This report also embraces Finance Docket No. 25686, Jones Motor Co., Inc., Stock; Finance Docket No. 18656, Louisville & Jeffersonville Bridge and Railroad Company, Merger, Etc.; and No. MC-FC-70907, Alleghany Corporation, Transferor, Jones Motor Company, Inc., Transferor.

II of the act. Although it is alleged that the proposed transactions, if consummated, would result in a termination of Alleghany's position as major investor and participant in the management of railroads and a shift of this great wealth and managerial experience to the motor carrier industry, no party, government agency or department, or carrier has intervened in support or in opposition to the proposed transaction. In order to prevent the important considerations involved in the subject transactions being decided on an unopposed record, we directed our Bureau of Enforcement to participate as a party in the title and embraced proceedings for the purpose of developing the record.

By a petition filed October 14, 1968, in Finance Docket No. 18656, Louisville and Jeffersonville Bridge and Railroad Company, Merger, Etc., Alleghany Corporation (Alleghany), of New York, N. Y., seeks to vacate orders of the Commission, dated March 2, 1955, and May 24, 1955, holding Alleghany, by virtue of its control of the New York Central Railroad Company, was to be considered as a carrier subject to certain provisions of the Interstate Commerce Act, as amended, to the same extent that those provisions are applicable to the New York Central Railroad Company and its carrier subsidiaries and affiliates.

By an application filed October 29, 1968, in No. MC-FC-70907, under section 212(b) of the act, Alleghany and Jones Motor Company, Inc. (Jones), of Spring City, Pa., a common carrier by motor vehicle subject to part II of the Interstate Commerce Act, seek authority for the transfer of the operating rights of the latter to the former.

By a second application filed April 9, 1969, as amended, in No. MC-F-10444, Alleghany seeks authority under section 5 of the Interstate Commerce Act to acquire control of Jones and its subsidiary Erie Trucking Company (Erie), also of Spring City, through the purchase of the capital stock of Jones. Alleghany also seeks to merge a wholly owned subsidiary of itself into Jones and subsequently the operating rights and properties of Jones into Alleghany for ownership, management, and operation. By the same application, Fred M. Kirby, also of New York, and Allan P. Kirby, Jr., of Morristown, N. J., individually and as coguardians of the property of Allan P. Kirby, an incompetent, seek authority under section 5 of the act to acquire control of the operating rights and property through the transaction.

By a separate application filed May 15, 1969, in Finance Docket No. 25686, as a matter directly related to the above proceedings

Jones seeks authority to issue 100 shares of its common stock, par value \$1.

By separate orders of division 3, dated January 24, 1969, in Finance Docket No. 18656, and No. MC-FC-70907, the Bureau of Enforcement (Bureau) was directed to participate as a party in the proceedings for the purpose of developing the record. By order dated August 14, 1969, it was likewise ordered to participate in No. MC-F-10444 and Finance Docket No. 25686. By the same order, the matters in all the above-numbered proceedings were consolidated for consideration and resolution. The matters were ordered handled under modified procedure. In so ordering the division also requested the parties discuss the following issues: (1) whether Alleghany controls or has the power to control Penn Central Company (Penn Central), as the percentage of stock held by a person, where less than a majority, is nondeterminative of the issue of control, *Chemical Leaman Tank Lines, Inc.-Pur.-Ryder*, 104 M.C.C. 686, 707; (2) whether Alleghany is affiliated with Penn Central within the meaning of section 5(6) of the act and, if so, whether the acquisition would enable such a rail carrier to use such service by motor vehicle to public advantage in its operations and not unduly restrain competition; (3) whether the authority for Alleghany to acquire the operating rights of Jones is properly sought under section 212(b) of the act; (4) whether the acquisition of control of Jones and its affiliates by Alleghany under section 5(2) of the act is consistent with the public interest, in view of the representation by Alleghany that the primary purpose for the acquisition of Jones, and its affiliates, is to enhance its tax position, and to insure Alleghany's continued regulation by this Commission; and (5) whether, under section 5, Commission approval of the proposed transaction is required in view of the fact that the transaction may involve only a noncarrier and a carrier and its subsidiaries, which carrier and its subsidiaries may comprise a single established system, *Louisville & J. B. & R. Co. Merger*, 295 I.C.C. 11, hereinafter sometimes referred to as the *Louisville* case, and *Kansas City Southern Industries, Inc., Control*, 317 I.C.C. 1, 4.

Jones, under a certificate issued in No. MC-4963 and sub-numbered proceedings, as described in the application, is authorized to operate, in interstate or foreign commerce, as a motor common carrier of general commodities, with exceptions, over regular routes extending between Chicago, Ill., St. Louis, Mo., and Fort Madison, Iowa, on the west, and Nashua, N. H., Boston, 109 M.C.C.

Mass., Providence, R. I., New York, N. Y., Philadelphia, Pa., and Baltimore, Md., on the east, via such principal intermediate points as Detroit, Mich., Toledo, Akron, and Cleveland, Ohio, Pittsburgh, Harrisburg, and Allentown, Pa., Trenton and Jersey City, N. J., Hartford, Conn., and Worcester, Mass.; and between Harrisburg and Baltimore and Bristol, Va., and Charlotte, N.C., via Harrisburg, Lynchburg, and Martinsville, Va., and High Point, N. C.

Erie, as described in the application, under a certificate issued in No. MC-23135 is authorized to operate, in interstate or foreign commerce, as a motor common carrier (1) of general commodities, with exceptions, over regular routes, between Buffalo, N. Y., and Erie, Pa., and between Erie and New York, N. Y., serving the intermediate point of Kane, Pa., and various off-route points; and (2) over irregular routes, of general commodities, between Erie, on the one hand, and, on the other, points in New York and in Pennsylvania within 80 miles of Erie, excluding Buffalo and Bradford, Pa., and between Kane, on the one hand, and, on the other, points in Pennsylvania within 80 miles of Erie, excluding the same two Pennsylvania points.

By an order dated November 17, 1969, in No. MC-F-10553, Jones Motor Co., Inc.—Merger—Erie Trucking Company and No. MC-4963 (Sub-No. 32), Jones Motor Co., Inc., Review Board No. 5 authorized the merger of the operating rights and property of Erie into Jones for ownership, management, and operation, and the acquisition by Marine Midland Grace Trust Company (Marine Midland), of New York, as voting trustee, of control of the operating rights and property through the transaction. By the same order certain irregular-route authority of Erie is to be converted to regular-route authority. The transaction has not been consummated.

Pursuant to authority granted under section 5(2) of the act on October 6, 1969, in No. MC-F-10328, Jones Motor Co., Inc.—Control and Merger—Mitchell's Express, Review Board No. 5 authorized acquisition by Jones of control of Mitchell's Express (Mitchell), of Portsmouth, N.H., merger of the operating rights and property of the latter into the former for ownership, management, and operation, and acquisition by Marine Midland of control of the operating rights and property through the transaction. Mitchell operates under a certificate issued in No. MC-16020, in interstate or foreign commerce as a motor common carrier of general commodities, with exceptions, over regular routes, between Boston, and Ogunquit, Maine, serving intermediate and

Mass., Providence, R. I., New York, N. Y., Philadelphia, Pa., and Baltimore, Md., on the east, via such principal intermediate points as Detroit, Mich., Toledo, Akron, and Cleveland, Ohio, Pittsburgh, Harrisburg, and Allentown, Pa., Trenton and Jersey City, N. J., Hartford, Conn., and Worcester, Mass.; and between Harrisburg and Baltimore and Bristol, Va., and Charlotte, N.C., via Harrisburg, Lynchburg, and Martinsville, Va., and High Point, N. C.

Erie, as described in the application, under a certificate issued in No. MC-23135 is authorized to operate, in interstate or foreign commerce, as a motor common carrier (1) of general commodities, with exceptions, over regular routes, between Buffalo, N. Y., and Erie, Pa., and between Erie and New York, N. Y., serving the intermediate point of Kane, Pa., and various off-route points; and (2) over irregular routes, of general commodities, between Erie, on the one hand, and, on the other, points in New York and in Pennsylvania within 80 miles of Erie, excluding Buffalo and Bradford, Pa., and between Kane, on the one hand, and, on the other, points in Pennsylvania within 80 miles of Erie, excluding the same two Pennsylvania points.

By an order dated November 17, 1969, in No. MC-F-10553, Jones Motor Co., Inc.—Merger—Erie Trucking Company and No. MC-4963 (Sub-No. 32), Jones Motor Co., Inc., Review Board No. 5 authorized the merger of the operating rights and property of Erie into Jones for ownership, management, and operation, and the acquisition by Marine Midland Grace Trust Company (Marine Midland), of New York, as voting trustee, of control of the operating rights and property through the transaction. By the same order certain irregular-route authority of Erie is to be converted to regular-route authority. The transaction has not been consummated.

Pursuant to authority granted under section 5(2) of the act on October 6, 1969, in No. MC-F-10328, Jones Motor Co., Inc.—Control and Merger—Mitchell's Express, Review Board No. 5 authorized acquisition by Jones of control of Mitchell's Express (Mitchell), of Portsmouth, N.H., merger of the operating rights and property of the latter into the former for ownership, management, and operation, and acquisition by Marine Midland of control of the operating rights and property through the transaction. Mitchell operates under a certificate issued in No. MC-16000, in interstate or foreign commerce as a motor common carrier of general commodities, with exceptions, over regular routes, between Boston, and Ogunquit, Maine, serving intermediate and

off-route points, and roadbuilding material, over irregular routes, between Swampscott, Mass., on the one hand, and, on the other, points in Strafford and Rockingham Counties, N.H. This transaction has also not yet been consummated.

Pursuant to authority granted under section 210a(b) of the act on August 5, 1968, in No. MC-F-10190, Jones Motor Co., Inc.—Purchase—Medill Transfer, Inc., as extended by order of December 18, 1968, Jones leased the operating rights of Medill Transfer, Inc., William H. Christison, Trustee in Bankruptcy (Medill), of East Peoria, Ill. Medill, under a certificate of registration issued in No. MC-99996 (Sub-No. 1), is authorized to operate as a motor common carrier of general commodities within a 50-mile radius of Allentown, Ill., and to transport such property to or from any point outside such authorized area of operations for a shipper or shippers within such area. Vendee commenced operations under the lease on September 3, 1968. The 5(2) application of Jones to purchase Medill was approved on December 12, 1969, by operation of law.

Penn Central operates as a rail common carrier generally on the east from Montreal, Canada, through Boston to Norfolk, Va., and on the west, from Mackinaw City, Mich., through Chicago to St. Louis.

Alleghany proposes to acquire control of Jones and its subsidiaries through purchase of the capital stock of Jones, and thereafter to merge a newly formed, wholly owned subsidiary of Alleghany, Alleghany Trucking Company (Trucking), into Jones, and, further, transfer to Alleghany, Jones' cash and receivables, prepaid items, franchises and operating rights, and the stock of its subsidiaries. Alleghany will assume substantially all of the current liabilities of Jones, while Jones retains essentially its revenue equipment and real property as well as its revenue equipment obligations. Alleghany proposes that it will become a motor carrier subject to part II of the act operating in interstate commerce through its Jones Motor Division and wholly owned subsidiary, Erie Trucking Company.

By letter agreement dated September 4, 1968, Alleghany agreed to make a tender offer of \$21 per common share and \$100 plus accrued dividends per preferred share of capital stock of Jones and certain stockholders of Jones agreed to sell their shares pursuant to the tender offer. Alleghany agreed to purchase tendered shares if at least 51 percent of outstanding shares of Jones were tendered. Shares purchased were to be deposited with a voting trustee, Marine Midland.

By an agreement dated September 26, 1968, between Alleghany and Marine Midland, Marine Midland agreed to accept all stock tendered through the above tender offer in order for Alleghany to avoid any question under section 5 of the act. Marine Midland was then to exercise all stockholders' rights as to the stock deposited to take any action necessary to protect the shares of stock. The shares are to be released upon surrender of the voting trust certificates delivered to Alleghany, accompanied by a certificate requesting release and certifying one or more of the following: (1) that the shares to be released have been sold to one or more persons not affiliated with Alleghany; (2) that an opinion has been rendered by counsel for Alleghany that assumption of control of Jones by Alleghany would not violate the act; (3) that an order has been issued by the Commission terminating its order of March 2, 1955, in *Louisville & J. B. & R. Co. Merger, supra*; or (4) that an order has been issued by the Commission approving release of such shares for any reason whatsoever.

By a letter agreement dated September 27, 1968, Trucking would be merged into Jones with Jones as the surviving corporation. Pursuant to the merger plan, the 100 shares of Trucking's \$0.01 par stock will be converted into 100 shares of Jones' newly issued common stock of \$1 par value. The \$99 excess will be charged to Jones' additional paid-in capital. Alleghany will surrender without consideration to Jones the shares of common stock of Jones held by Alleghany or its voting trustee. These shares will be converted into additional paid-in capital by Jones. The remaining shares of Jones held by minority stockholders will be converted into the right to receive \$21 per share. Trucking will transfer to Jones an amount to satisfy this obligation. Further, Jones will purchase from Alleghany and retire its outstanding preferred stock. Alleghany will waive payment and these preferred shares will also be converted into additional paid-in capital by Jones. As of January 10, 1969, 605,715 shares, or 98.19 percent of the outstanding shares of common stock, and all of the 3,356 outstanding shares of preferred stock of Jones were acquired by the voting trustee for Alleghany.

In related Finance Docket No. 25680, Jones is seeking a authority under section 214 of the act for the issuance of 100 shares of \$1 par value common stock. Such 100 shares, as previously mentioned, will be issued to Alleghany in conversion for all of the 100 outstanding shares of Trucking. Upon completion of the proposed control and purchase, Alleghany will hold the 100 shares of the

newly issued common stock of Jones, and Jones will have no other capital stock outstanding.

One of the primary reasons presented by Alleghany for acquisition of the operating rights of Jones is to lessen its tax burden. Such burden arises from the fact that Allan P. Kirby, as of February 28, 1969, was the beneficial owner of 4,084,813 shares, or 56.21 percent of the outstanding common stock of Alleghany. Alleghany is, therefore, for Federal income tax purposes, considered a personal holding company since one person (less than 5 individuals) owns more than 50 percent of its stock and has "personal holding income," (60 percent or more of adjusted gross income consists of dividends and interest) and is therefore subject to a 70-percent penalty tax on the "undistributed personal holding income." Alleghany does not want to distribute all such income to avoid the tax. With Alleghany the recipient of the operating revenue generated by its Jones Motor Division, it alleges it would be an operating company rather than a holding company for Federal tax purposes. It could then retain and reinvest net earnings and would not be subject to the 70-percent penalty tax.

Evidence of past operations by Jones under its operating rights is reflected in an abstract of shipments showing all shipments transported in January 1969. The traffic handled consisted of a wide variety of commodities, showing service to points throughout Jones' authority.

In its verified statement filed on October 1, 1969, Alleghany stated that as of February 1, 1968, the date of the Penn Central merger authorized by the Commission in *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, Alleghany received and still holds 196,195 shares or 0.81 percent of the 24,104,708 shares outstanding of Penn Central stock. In addition, Allan P. Kirby, controlling stockholder of Alleghany, received and presently holds 390,130 shares or 1.62 percent of the outstanding Penn Central shares. Combining their interests, Alleghany and Kirby together own 2.43 percent of the outstanding Penn Central stock. Alleghany's shares in Penn Central are held in its own name but the Kirby shares are among those held in the name of Sigler and Company.

Alleghany is also the controlling shareholder of Investors Diversified Services, which serves as an investment advisor and distributor for a group of mutual funds. As of September 30, 1969, these mutual funds held 391,900 shares or 1.63 percent of the outstanding shares of Penn Central. It is alleged investment

decisions for these funds are made solely by their investment committees, over which Alleghany and the Kirby family exercise no control or power to control.

Included in the verified statements was a list of the 30 largest stockholders of Penn Central as of April 3, 1969. From this it can be seen that the 2.43 percent held by Alleghany and Kirby together would make the Kirby interests the second largest shareholders in Penn Central, the largest being the trustees of the New York, New Haven & Hartford Railroad Company which own 950, - 116 shares, or 3.94 percent of the total outstanding shares. If, however, the shares held by Alleghany, Kirby, and Investors Diversified are totaled, the combined holding of 4.06 percent of Penn Central stock exceeds that owned by the trustees of the New York, New Haven & Hartford Railroad Company.

By application filed April 28, 1969, in Finance Docket No. 25660, *Penn Central Holding Company—Acquisition of Control—Penn Central Company*, dismissed August 7, 1969, for lack of jurisdiction, it was shown that Penn Central Holding Company (Holding), a noncarrier, was to acquire control of Penn Central and subsidiaries effective October 1, 1969. Holding has a 14-member board of directors, 1 of which is Fred M. Kirby, president and chairman of the board of Alleghany. Three directors of Alleghany, namely, Messrs. Fred M. Kirby, Daniel E. Taylor, and Carlos J. Routh, serve on the 22-member board of directors of Penn Central, now the transportation operating company.

Three members of the Alleghany board of directors, Messrs. Fred M. Kirby, Carlos J. Routh, and Charles T. Hill, serve on the 14-man board of directors of Pittston Company. Mr. Routh is vice chairman of the Pittston board. Pittston Company was found by the Commission in *Pittston Co.—Control—Brink's, Inc.*, 75 M.C.C. 345, to be a carrier subject to the act under section 5(3). Two large motor carriers, Brink's, Inc., and United States Trucking Company, holding extensive authority issued by the Commission, are under the control of Pittston. In addition, Pittston controls a Canadian carrier, Direct Winters Transport Limited, which carrier holds limited Commission authority.

Mr. Fred M. Kirby, in addition to his other duties, serves as a director of U. S. Industries, Inc. U. S. Industries controls B & P Motor Express, Inc., a carrier operating under a certificate issued by this Commission.

Mr. John J. Burns, a director of Alleghany as well as vice president-financier of Alleghany Corporation, is a director of

Specialized Services, Inc. Specialized Services, Inc., controls Superior Trucking Company, Inc., a carrier operating under a certificate issued by the Commission. Mr. Burns owns 3.3 percent of the voting stock and 1.4 percent of the nonvoting stock of Specialized Services, Inc.

Messrs. Allan P. Kirby, Jr., and Andrew Van Pelt, directors of Alleghany, are directors of the Pittsburgh & Lake Erie Railroad Company, while Mr. Ralph K. Gottshall, a director of Alleghany, serves as director of the Philadelphia, Baltimore and Washington Railroad and the Baltimore and Eastern Railroad Company.

International Utilities, Inc., controls Ryder Truck Lines, Inc., a carrier subject to Commission jurisdiction. Alleghany owns a beneficial interest in 114,200 shares of common stock of International Utilities, Inc. Voting control of these shares is held by The Franklin National Bank. Alleghany also has investments in the securities of other carriers. These investments include a beneficial interest in 20,753 shares of class B capital stock of the Missouri Pacific Railroad Company (MoPac), constituting 52.2 percent of 39,371 shares of such stock outstanding as of December 31, 1968. Alleghany also has a beneficial interest in 2,200 shares of the class A capital stock of MoPac or less than 1 percent of the 1,861,577 shares of such stock outstanding as of December 31, 1968. Voting control of all of Alleghany's MoPac shares is vested in The Franklin National Bank.

The directors of Alleghany, other than Allan and Fred M. Kirby, collectively own, control, or have a beneficial interest in 23,060 shares of Penn Central stock. All of the directors of Alleghany in their individual capacity collectively own, control, or have a beneficial interest in 92,815 shares of Pittston Company, or approximately 2 percent of the outstanding stock.

In response to the issues raised by the order of August 14, 1969, Alleghany argues that neither it nor the Kirby family control nor have the power to control Penn Central. In support of this argument they cite the hearing examiners' report in *Pennsylvania R. Co.—Merger—New York Central R. Co.*, *supra*, at page 639, wherein it is stated that:

*** we do not believe that Alleghany's holdings of 5.8 percent of the outstanding capital stock in the merged company would afford sufficient momentum to obtain control of the proposed company.

It is further contended that if Alleghany had been a controlling party at the time of the above-cited case it would have had to be a

party to the application before the Commission would have had jurisdiction to approve the merger, citing *U. S. v. Marshall Transport Co.*, 322 U.S. 31. With the consummation of the Penn Central merger, it is alleged that the holdings of Alleghany and the Kirby family in Penn Central have decreased, as have their membership and influence on the board of directors. In regard to the question raised by the Commission as to whether Alleghany is affiliated with Penn Central within the meaning of section 5(6) of the act, Alleghany maintains that a mere minority stock ownership or minority representation on the board of directors alone does not give rise to section 5(6) affiliation. Instead, it is argued such relationship ordinarily arises from the existence of a financial or business relationship with the carrier. Alleghany alleges it has no commercial, financial, or other arrangements of any kind with Penn Central; has no control over Penn Central operations, and holds less than 10 percent of the seats on the Penn Central board. It is further alleged that since the investment in Jones is of almost equal value to that Alleghany already has in Penn Central there will be no economic motive to manage one in the interest of the other. If its argument that it is not affiliated with Penn Central within the meaning of section 5(6) is accepted, Alleghany points out the proviso of section 5(2)(b) of the act is not applicable.

As to whether acquisition of control of Jones is consistent with public interest, Alleghany claims that public interest includes not only direct benefits to the shipping public but also indirect benefits through strengthening of the financial condition of the carrier involved, leading to longrun economies for the public. It is readily admitted the original intention in acquiring Jones was to avoid classification as a personal holding company under the Internal Revenue Code and thus to conserve funds which would otherwise have to be paid under the penalty tax provision. Still, it is argued the funds so saved will be available for improvement of Jones' carrier operations. It is claimed that it is in the public interest to have the union of a company having substantial financial resources with a carrier allegedly having a large need for cash to successfully continue its service. It is alleged that Alleghany's tax savings will make available to Jones approximately \$8,815,000 between 1969 and 1973. This will allow Jones to improve plant and equipment and achieve a growth rate not possible without the help of a company such as Alleghany. In support of its position that it is in the public interest for a company to realize tax savings if passed on to the carrier being acquired, Alleghany cites *Quinn Freight Lines, Inc.—Control and Merger*, 87 M.C.C. 257.

Alleghany turns last to the jurisdictional question concerning whether the Commission has jurisdiction to consider the applications and, if so, whether under section 212(b) or section 5(2) of the act. It is argued that despite the fact Alleghany was ordered in the *Louisville* case to be considered a carrier subject to the provisions of section 20(1) to (10), inclusive, and section 20a(2) to (11), inclusive, of the act, the order constituted Alleghany a carrier only for the purposes enumerated therein and not a carrier within the meaning of sections 5(2) and 5(4) of the act.

It is further argued that the acquisition of Erie by Jones does not alter the situation in that Jones and Erie are an established family of carriers within the meaning of *Woods Industries, Inc.-Control-United Transports, Inc.*, 85 M.C.C. 672. Citing the same case, it is further argued that the change in Alleghany's control of Erie from indirect to direct stock ownership would not result in approval being required under section 5(2). If the two transactions involved are treated separately, Alleghany argues, the acquisition of control of the carriers would not be subject to Commission approval; only the second transaction would fall under section 212(b).

In the alternative, Alleghany argues, if the two described transactions are to be treated as a single transaction it will necessitate section 5(2) approval in that it involves acquisition by a noncarrier of stock control of one carrier and in effect control and merger of a second carrier.

In summary, Alleghany states the jurisdictional problem is one of fact. It prays the Commission find Alleghany does not control Penn Central and grant all relief except that requested in No. MC-FC-70907, which it asks be dismissed. It prays that the termination of the section 5(3) order in Finance Docket No. 18656 be made effective with consummation of the transaction in No. MC-F-10444 when Alleghany will become a carrier.

The verified statement of the Bureau, filed October 30, 1969, briefly summarized the facts previously set forth by Alleghany. Citing the prior decisions of the Commission as to the distinction between control of a single established system and control over nonintegrated systems, the Bureau asks that the Commission find the "single established system" rule was not originally contemplated by Congress, is contrary to Commission practice prior to the *Louisville* case, is an unjustified discrimination in favor of holding companies having single established carrier systems, and is contrary to the public interest of having the

Commission maintain close supervision over those controlling important sectors of our national transportation system. In the alternative it is argued that section 5(2) would be applicable both because the involved transactions involve alterations in the present structure of Jones and the recent acquisitions by Jones have made alterations in the internal structure of Jones which acquisitions have not been in effect long enough to be fully integrated into the Jones operations. It thus contends that the proposed transactions for acquisition of control by Alleghany over Jones are ones which fall within the purview of section 5 of the act and that the application filed in No. MC-FC-70907 under section 212(b) be dismissed.

DISCUSSION AND CONCLUSIONS

Before we may consider the substantive issues raised by these applications we must determine the jurisdictional question as to whether the applications are to be considered under section 212(b) or section 5(2) of the act. There is no evidence of record that we are here dealing with a single established transportation system to bring the proposed transaction within the rule established in the *Louisville* case. Even if Jones and Erie were to be regarded as constituting a single transportation system the outstanding temporary authority under which Medill is operated would prevent the existence of a single transportation system. Being operated only under a lease, Medill cannot be considered integrated into the Jones or the Jones-Erie system. It is possible, but by no means certain, that if the Jones' application to purchase Medill, filed under section 5(2), is consummated, then the operations under Medill's authority may be integrated with the Jones' operations. In any event, it is premature to consider Medill as part of the Jones "system." It is obvious that Alleghany, upon approval of this application, will succeed Jones in operating Medill under the lease. In so doing it cannot be doubted Alleghany is acquiring two or more carriers and therefore jurisdiction lies under section 5(2) rather than section 212(b). Further, the section 212(b) application cannot be considered as an isolated transaction divorced from the Jones-Erie merger and the acquisition of control or the purchase of the motor carrier properties of Medill and Mitchell. Certainly, it is proper for the Commission to consider the totality of the situation that will result from approval of either the section 212(b) application or

the section 5 application. All the transactions have as their common purpose the establishment of Jones as a motor carrier subsidiary of Alleghany in a more viable position than Jones was as an independent motor carrier. Hence, when viewed as the capstone of a series of interrelated transactions, it becomes apparent that section 5 and not section 212(b) is the applicable section under which the application should be processed.

Applicants by letter dated November 3, 1969, filed in lieu of a reply statement, stated that they concur with the Bureau's view that the Commission should entertain jurisdiction under section 5(2) of the act. There being no doubt that jurisdiction lies under the provisions of section 5(2) rather than under section 212(b), the application in No. MC-FC-70907 is hereby dismissed and the application in No. MC-F-10444 is hereby considered on its merits.

Having decided the jurisdictional question we must now determine the present status of Alleghany in order to place consideration of the application to acquire Jones in the proper perspective. The question as to whether Alleghany controls or has the power to control Penn Central was resolved by the Commission in *Pennsylvania R. Co.-Merger-New York Central R. Co.*, 327 I.C.C. 475, 481, in its adopting the findings of the hearing examiners, the examiners having found Alleghany's holdings did not provide it sufficient momentum to obtain control of Penn Central. No evidence has been submitted since that time to lead us to believe Alleghany's position has changed so as to place it in a position that it exercises control or has the power to control the Penn Central. We therefore see no reason to disturb our prior holding.

While Alleghany does not control Penn Central, there remains for decision whether with consummation of the proposal Alleghany and Penn Central will be affiliated within the meaning of section 5(6) of the act.

Section 5(6) of the act provides:

For the purposes of this section a person defined in section 1(3)(a) to include a corporation shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

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Section 5(2)(b) further states:

That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction /under section 5(2)/ involving a motor carrier, the Commission shall not enter *** an order /approving the transaction/ unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

Applying the quoted statutory provisions to this case, if Alleghany is found to be affiliated with Penn Central within the meaning of section 5(6), approval of the section 5(2) application may not be given unless the express findings of the 5(2)(b) proviso may be made vis-a-vis Penn Central and Jones.

In making such a determination, the test is not whether such person controls or has the power to control the carrier it is alleged to be affiliated with, but whether the legal and economic relationship between the two is such as to make it reasonable to believe the carrier to be acquired will be managed in a common interest with the other carrier. Managed in a common interest does not mean in the sole or even principal interest of such carrier, but in any material degree. *Southwestern Greyhound Lines, Inc.—Merger*, 39 M.C.C. 243.

In order to determine whether affiliation exists between the Penn Central and Alleghany, whether "it is reasonable to believe that the affairs of any carrier /Jones/ of which control may be acquired by such person /Alleghany/ will be managed in the interest of such other carrier /Penn Central/," a number of factors must be examined. A factor of particular significance is whether the person in question is dependent upon the continued successful operation of the "other carrier," either because of personal stock investment in the company or because the company is indebted to him. *Porto Transport, Inc.—Purchase—Sommer's Motor Lines*, 70 M.C.C. 70. Another factor to be considered is representation on the board of directors of the "other carrier," such being regarded as participation in management. *Southwestern Greyhound Lines, Inc.—Merger, supra*. These factors standing alone will not automatically be considered to establish that affiliation exists but must be viewed along with the other facts existing in the particular case in order to decide if affiliation exists.

Alleghany does have a substantial investment in Penn Central stock. As of June 30, 1969, the market value of Alleghany's Penn Central stock was said to total \$9,687,128 or approximately 5 percent of Alleghany's total assets. Advancing the following argument, Alleghany disclaims any intention of managing Jones in the interest of Penn Central:

Nor will Jones be managed, as a matter of fact or of law, in the interest of Penn Central. As of June 30, 1969, and as reported in the Semi-Annual Report to Shareholders, the indicated market value of Alleghany's Penn Central stock was \$9,687,128, and its investment in Jones (at cost plus unrealized equity in earnings since October 1, 1968) was listed at \$14,200,417. There is, therefore, no economic motive to manage one in the interest of the other since the value of the investments are similar in amount. In addition, Alleghany's investment in Penn Central, around 5 percent of Alleghany's total assets, does not support the inference that Jones Motor would be managed consistent with the interests of Penn Central. (See, *e.g.* *Harold C. Davis*, 70 M.C.C. 70 (1956)). Stated otherwise, Alleghany has no intention to manage Jones in the interest of Penn Central; the intention is to manage Jones in its own best interests and for the benefit of its shippers, employees, and the general public.

Alleghany's investment in the Penn Central, referred to in the quoted argument, does not take into consideration the value of the Penn Central shares held or controlled by individual Alleghany directors or the 391,900 shares of Penn Central held by Investors Diversified Services, Inc. Assuming that Alleghany's interest in Penn Central has only a monetary value of \$9,687,128, this approximately \$9 million interest plus the reported value of the Jones' shares totals \$23,887,545, or approximately 10 percent of Alleghany's total assets. It is reasonable to conclude that if a choice were presented of soliciting noncompetitive traffic or traffic presently transported by the Penn Central, Alleghany's management would not deliberately set about to depreciate the value of its Penn Central investment by actively competing for Penn Central traffic through reduced rates or better service. This consideration is especially significant since Jones operates in the same territory served by Penn Central. Conversely, it may be presumed, but cannot be proved, that the management of the Penn Central, many formerly high officials in the New York Central Railroad when the Central was controlled by Alleghany, would favor Alleghany as a motor carrier over other motor carriers in connection with plan I TOFC service or other joint-line arrangements.

Alleghany does have representation on the Penn Central board as well as on the boards of the following subsidiary rail carriers, the Pittsburgh & Lake Erie Railroad Company, the Philadelphia, Baltimore and Washington Railroad, and the Baltimore & Eastern Railroad Company. As a result of this representation on the board of the Penn Central and subsidiary rail carriers, greater than would be expected based solely on Alleghany's stockholdings, Alleghany does participate in the management decisions of Penn Central. Participation in the management of the largest railroad system in the territory presently served by Jones would obviously give Alleghany as a motor carrier a competitive advantage over other motor carriers operating in the same area. Alleghany, for example, would know long in advance of the general public, other motor carriers, and the Commission whether under their section 5a agreement the rail carriers had agreed to file for a general increase in rates, the date of filing said increase, the amount of increase, commodities exempted from said increase, and arguments to be advanced in support of said increase. All this information would be available to Alleghany as a motor carrier despite the fact that its representation on the Penn Central board was insufficient to control the railroad.

On the basis of Alleghany's investment in Penn Central, its representation on the Penn Central board, its previous position of dominance over the affairs of the New York Central (and hence its close association with the top management of the railroad), and the fact that both the Penn Central and Jones operate in the same general territory, we conclude that it is reasonable to believe that the proposed transaction would, if consummated without special conditions, result in affiliation within the meaning of section 5(6) of the act. It is, therefore, necessary to determine whether the proposed transactions are consistent with section 5(2)(b) of the act.

The absence of Penn Central as a party to these proceedings, coupled with the conclusion that Alleghany does not control Penn Central within the meaning of section 5(2) of the act as distinguished from affiliation under section 5(6), makes it impossible to conclude that the proposed transactions will enable the Penn Central to use the services presently rendered by Jones to public advantage in its operation and will not unduly restrain competition.

While not admitting that affiliation would result from approval of the proposed transactions, Alleghany, apparently in a desire

to remove impediments to the proposed transaction, in its application stated, in part, as follows:

Alleghany is willing to accept a condition to Commission approval of the transactions proposed herein that its shares of capital stock of MoPac shall continue to be held in trust, and that its shares of the capital stock of the Penn Central, and any other carrier securities subsequently acquired, shall be similarly deposited in trust, and that the Commission shall continue to exercise jurisdiction over said trust or trusts.

This offer was repeated in an affidavit of record by Fred M. Kirby, chairman of the board of directors and president, Alleghany Corporation, in the following manner:

12. As set forth in its Application to the Commission under §5 of the Act, Alleghany is willing to accept as a condition to Commission approval of the proposed acquisition by Alleghany of Jones Motor Co., Inc., the deposit of Alleghany's shares of the capital stock of Penn Central with an independent trustee subject to continuing Commission jurisdiction.

The placing of Penn Central shares in trust, suggested by Alleghany, is but at best a stopgap measure. While the trust would probably serve to prevent Alleghany from participating in the management of the Penn Central (and we shall hereinafter require that the board members of Alleghany serving on the board of directors of the Penn Central, its subsidiaries, and its holding company immediately resign their directorships with the Penn Central, its subsidiaries, and its holding company), it would not serve to reduce Alleghany's interest in the financial condition of the Penn Central. This financial interest is one of the factors considered in our determination of affiliation. Investment by a motor carrier, which Alleghany seeks to become, of 5 percent of its total assets in railroad stock appears inconsistent with the status of a motor carrier. The 5-percent figure includes only Alleghany's investment in Penn Central and it is noted that its investment in MoPac stocks and bonds substantially increases the percent of assets invested in railroad securities. It is not our intention to allow a motor carrier certificate to be used as a shield to prevent regulation by the Securities and Exchange Commission while Alleghany continues to engage primarily in investment rather than in transportation activities. Accordingly, we direct that as a condition to approval of this application Alleghany trustee all stock it may have in Penn Central, its subsidiaries, or any company affiliated with the Penn Central for a period not longer than 5 years with direction to the trustee to dispose of said stock

during the period of the trust. Prior to consummation of the transaction proposed herein, Alleghany shall submit for approval of the Commission a plan showing how it intends to effectuate such trusteeship. While undoubtedly the divestiture of Penn Central shares by the trustee may have certain tax consequences, i.e., either the sale will result in a profit or a loss, Alleghany may avoid the tax consequence by electing not to consummate the proposed transaction. Further, the record before us indicates that the trustee should experience little difficulty in disposing of 390,130 shares of Penn Central now owned by Alleghany. Contained in the affidavit of Fred M. Kirby, previously referred to, is the following statement:

15. As of April 9, 1969, the date of the aforesaid Application under §5, the total amount of the capital stock of Penn Central owned by the funds sponsored by IDS [Investors Diversified Services, Inc.] was 1,020,000 shares or approximately 4.23% of the total amount outstanding, all of which were held for investment purposes only and not for purposes of control. As of this date [September 30, 1969], all but 391,900 of said shares, representing approximately 1.63% of the Penn Central capital stock outstanding, have been sold.

We will further require as a condition to approval that all interlocking directorates between Alleghany and Penn Central, its subsidiaries, and affiliates be terminated. Prior to consummation, proof of such termination shall also be submitted to the Commission. *Chesapeake & O. Ry. Co. Purchase*, 261 I.C.C. 239. Still further, in accordance with Alleghany's suggestion, and our own independent evaluation of the situation, we shall require as a condition for consummation of the proposal that the trusteeship of Alleghany's MoPac securities, as previously ordered by the Commission, be continued subject to the continuing jurisdiction of the Commission. The Commission in the future may either in response to a petition or on its own motion institute an investigation to determine whether the trust should be continued or whether Alleghany's divestiture of MoPac securities should be required.

The Penn Central shares not owned by Alleghany, but controlled by Fred M. Kirby and Allan P. Kirby, Jr., as coguardians of the property of their father, Allan P. Kirby, present a special problem. The 390,130 shares of Penn Central owned by Allan P. Kirby represent 1.62 percent of the outstanding Penn Central shares. While Fred M. Kirby and Allan P. Kirby, Jr., are by the terms of the conditions imposed relating to interlocking

directorships prohibited from serving on the board of both Alleghany and Penn Central, either brother may resign his position with Alleghany and serve on the Penn Central board. In order to forestall the possibility of one of the coguardians electing to serve on the Penn Central board and the other coguardian electing to serve on the board of Alleghany, it is appropriate that a condition be fashioned to prevent the Kirby family from serving as a bridge over which affiliation between the Penn Central and Alleghany might be established. Accordingly, we shall require that the Penn Central shares owned by Allan P. Kirby under the control of Fred M. Kirby and Allan P. Kirby, Jr., as coguardians of their father's property, be deposited with an independent voting trustee under an agreement subject to the prior approval of the Commission. While not at this time directing that said trust be terminated by divestiture of Penn Central shares within a prescribed period, we shall retain continuing jurisdiction over the trust for the purpose of imposing in the future additional conditions or modifying the trust if warranted by then existing factual conditions.

There is also present in the record evidence of various interlocking directorates between Penn Central, Pittston Company, Alleghany, International Utilities, Inc., and other carriers. The cancellation of the interlocking directorates that exist between Alleghany and Penn Central should do much to simplify the relationship between these carriers. Other than in the situation that would exist between Alleghany and Penn Central if the proposed transaction were approved without conditions, the record does not contain sufficient evidence to determine the relationship between Alleghany and these other carriers and holding companies. If it should subsequently appear that these other carriers have become affiliated with Alleghany within the meaning of section 5(6) of the act or are otherwise operating in violation of the act, we expressly reserve the right to reopen these proceedings for the purpose of imposing further conditions upon Alleghany. At this time we will merely require that Alleghany's shares of International Utilities, Inc., be continued to be controlled by an independent voting trustee.

Before reaching the issues presented by the section 5(2) application, we must first determine whether the facts of record disclose a section 5(4) violation. Section 5(4) provides, in part, as follows:

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It shall be unlawful for any person, except as provided in paragraph (2) [with Commission approval], to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained***.

There can be no doubt that there was a statutory violation. In acquiring the outstanding stock of Jones and Erie without prior Commission approval, Alleghany violated the provisions of section 5(4) of the act. In an attempt to insulate itself from Jones' operations and thereby avoid the continuing violation of the statute, Alleghany immediately placed legal ownership and management responsibility for the carriers in the hands of Marine Midland. The trust so created was drafted in terms obviously designed to meet the requirements for independent voting trusts heretofore approved by the Commission in proceedings with similar factual situations. See *Missouri Pac. R. Co.—Control—Chicago & E.I.R. Co.*, 327 I.C.C. 279, 319.

The Commission does not view with favor the purchase of control and then placing the stock in trust. This practice is contrary to the intent of the statute in that the statute envisions approval of control by the Commission before and not after the purchase of control. The provisions of section 5 were not written by the Congress to be circumvented by carriers eager not to lose a good "deal," and those who do so flout the intent of Congress and impede the Commission in the discharge of its duties under the law. The purchase of control without prior Commission approval, even if the stock is placed in trust, constitutes a violation of the law and as such placed in serious question the fitness of Alleghany as a carrier. We made clear in our recent decision in *East Texas Motor Frt.—Control—Consolidated*, 109 M.C.C. 213, that actions similar to those taken here would not be condoned in the future. We again repeat the admonition stated therein that there is no excuse for violating the act to consummate a transaction.

It is noted that the unlawful control and the placing of the stock in trust occurred prior to our decision in *East Texas Motor Frt.—Control—Consolidated*, *supra*. While this may constitute a mitigating circumstance, it will not serve to excuse future violations. In this connection we believe it appropriate to specifically advise Alleghany that its representation contained in its application, that "Alleghany is willing***[that] any other carrier securities subsequently acquired, shall be similarly deposited in trust" is

totally unacceptable to the Commission. If Alleghany as a motor carrier should purchase other carrier securities, it will subject itself to possible prosecution for violation of section 5 of the act. The placing of stock in trust will not serve to excuse or mitigate a consummated statutory violation.

Further, although section 5(11) of the act relieves parties to an approved section 5(2) application "from the operation of the anti-trust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved," this immunity is limited to operations conducted in accordance with the provisions of the Interstate Commerce Act and Commission imposed conditions. "Regulated industries are not *per se* exempt from the Sherman Act," *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456, and see also *Pan American World Airways v. U. S.*, 371 U.S. 296, 304-306.

Even though we have found a statutory violation through the unlawful acquisition of control, we are not free to summarily deny the application. Instead, we must examine the entire record in order to dispose of the application in a manner which would best serve the public interest. A violation of section 5(4) will not automatically defeat a transaction, if overriding public interest considerations plainly call for an opposite result. As to whether the proposed transaction is in the public interest, it need not be repeated that the tax consequences of a transaction have always been taken into account by the Commission in its consideration of applications under section 5(2). Tax benefits legally obtained have been considered as being salutary and even as grounds for delaying consummation of a merger if it would benefit the vendee. See *Arkansas-Best Freight System, Inc.—Control—Delta*, 93 M.C.C. 474. A tax saving is, therefore, a proper objective. However, an application to acquire a carrier solely because it will provide vendee certain tax benefits and for no other reason stands in a different position. Approval of an acquisition of that type would be tantamount to allowing vendee to simply milk vendor of its assets for its own good. Such a sycophantic transaction would obviously not be in the public interest. Alleghany has made clear its purposes are other than simply obtaining such benefits. The benefits it obtains are to be reinvested in Jones in order to improve its operations. The obtaining of tax benefits and reinvestment of the benefits to the advantage of Jones and thereby the shipping public is indeed salutary and in the public interest.

Alleghany has in the past been subject to regulation by the Commission only under section 5(3) of the act. As a result of the transaction here proposed, Alleghany admits it will become a motor carrier subject to part II of the Interstate Commerce Act through the transfer to itself of the operating rights and assets previously held by Jones. In becoming such a carrier Alleghany must fully realize it is now subject to all provisions of that part of the act, including the securities provisions of section 214. Its future activities will be expected to be those proper for a carrier operating in the public interest and in accordance with the national transportation policy. All securities issued by Alleghany, except to the extent limited by section 214 of the act, must be in full compliance with the provisions of section 20a(2) of the act and applicant may be certain any future applications for issuance of securities will be closely scrutinized to ascertain that they are fully in compliance with the act.

In the past it has appeared Alleghany desired to use this Commission as a shelter to protect itself from the harshness of regulation of other agencies and it indeed admits that its purpose in being before the Commission here is at least in part to find such protection. The Interstate Commerce Act was not passed to provide a safe harbor from the other agencies of the Federal and State governments. Its purpose, as stated in the national transportation policy, was:

to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers***.

If regulation under the act results in leniency toward certain activities of carriers, it is because such leniency fosters the more important goals stated above. Alleghany will in the future be subject to the same type of regulation as other carriers. However, it is not to be expected that it will be protected from the regulation of any other agency to the extent the law may permit that agency to exercise concurrent jurisdiction over it.

In view of our action herein making Alleghany a carrier subject to part II of the act, we may vacate the previous orders of the Commission of March 2, 1955, and May 24, 1955, making Alleghany a noncarrier subject to regulation under the provisions of section 5(3) of the act.

Inasmuch as we are approving the transactions, we are not requiring of Alleghany the divestiture of Jones stock, though

acquired unlawfully, provided that the complete transaction which we herein authorize is consummated within the 180-day period which is provided in our order. That order will render the Marine Midland trust revocable and will permit Alleghany to take legal title to the Jones securities now held therein. Consequently, in the event Alleghany does not assume control of Jones within the 180-day period, it would be expected to immediately dispose of its holdings in Jones' stocks and notify this Commission promptly when this has been done, disclosing in detail the manner in which disposal of the stock has been accomplished. Otherwise, consideration will be given to the institution of a proceeding under section 5(7) of the act, designed to accomplish the divestiture.

We find, in No. MC-F-10444, that the acquisition by Alleghany Corporation of the operating rights and property of Jones Motor Company, Inc., and its subsidiary, Erie Trucking Company, through merger of Alleghany Trucking Company, a wholly owned subsidiary of Alleghany Corporation, into Jones Motor Company, Inc.; and subsequently the merger of Jones Motor Company, Inc., into Alleghany Corporation for ownership, management, and operation, and the acquisition by Fred M. Kirby and Allan P. Kirby, Jr., individually and as coguardians of the property of Allan P. Kirby, an incompetent, of control of the operating rights and property through the transaction, constitute a transaction within the scope of section 5(2)(a) of the act, and that subject to the conditions heretofore enumerated it will be consistent with the public interest; and that if the transaction is consummated, Alleghany Corporation will be entitled to operate under the rights of Jones Motor Company, Inc.; confirmed in No. MC-4963 and No. MC-4963 (Sub-Nos. 4, 7, 8, 9, 10, 13, 14, 15, 19, 20, 21, 22, 23, 24, 26, and 28), and of Erie Trucking Company confirmed in No. MC-23135, which rights are authorized to be embraced in a certificate to be issued in its name, with duplications eliminated; provided, however, that prior to consummation Alleghany Corporation and Fred M. Kirby and Allan P. Kirby, Jr., as coguardians of the property of Allan P. Kirby shall, subject to the just and reasonable conditions heretofore set forth, (a) deposit their holdings in Penn Central Company, Penn Central Transportation Company, its subsidiaries and affiliates, with independent voting trustees, (b) terminate all interlocking directorates of Alleghany Corporation, Penn Central Company, Penn Central Transportation Company, and their subsidiaries and affiliates, and (c) continue in trust the shares of MoPac and International Utilities, Inc., owned by Alleghany.

We further find, in Finance Docket No. 25686, that issuance by Jones Motor Company, Inc., of not to exceed 100 shares of its common stock, par value \$1 per share (a) is for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for, and consistent with, the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purposes.

We further find, in Finance Docket No. 18656, the orders of the Commission dated March 2, 1955, and May 24, 1955, finding Alleghany to be a carrier subject to the provisions of section 20(1) to (11), inclusive, and section 20a(2) to (11), inclusive, of the Interstate Commerce Act, be vacated.

We further find, in No. MC-FC-70907, transfer of the operating rights of Jones Motor Company in No. MC-4963 and No. MC-4963 (Sub-Nos. 4, 7, 8, 9, 10, 13, 14, 15, 19, 20, 21, 22, 23, 24, 26, and 28) to Alleghany Corporation under section 212(b) of the act, be dismissed.

An appropriate order will be entered.

COMMISSIONER TUGGLE, whom COMMISSIONER JACKSON joins, concurring in part:

I agree with the grant of authority and the requirement that the Alleghany and Kirby holdings in Penn. Central be placed with an independent trustee.

I disagree with the requirement that the Alleghany trustee dispose of the Penn Central holdings within 5 years. In my opinion, measuring the size of Alleghany's holdings—which represent about 5 percent of its total worth and less than a 1-percent interest in Penn Central—against the statute's definition of "control" or "affiliation," I find that these holdings, in the trust agreed upon by Alleghany, represent only an investment and nothing more. As such, I find it inconsistent to require Alleghany to eventually sell off its stock without requiring as much from the Kirbys. It makes no difference how much of Alleghany's resources are invested in railroad stock, including MoPac, as long as the spectre of control or affiliation does not haunt the relationship. Without that threat, the condition on Alleghany is unreasonable.

CHAIRMAN STAFFORD, dissenting:

Clearly, Alleghany violated section 5(4) of the act in acquiring the outstanding stock of Jones and Erie without prior Commission

approval. While I agree with the majority finding that such a violation will not automatically defeat the transaction, I find nothing in the record to show that overriding public interest warrants its approval. Alleghany's primary purpose in acquiring Jones, and its affiliates, is to lessen its tax burden. The fact that funds conserved by approval of the transaction will be made available for carrier investment by Jones and thus benefit the public indirectly is not what I consider to be of overriding public interest. Jones is a viable, financially sound and well managed corporation and I feel certain that it could continue to adequately serve the public in the future as it has in the past without benefit of Alleghany's tax savings. In *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39, 43, and 44, the Commission stated:

The public interest is concerned not only with improvements in transportation service, but also with the maintenance of respect for and the observance of the law. If the Frisco is permitted to retain the fruits of its unlawful conduct, and we sanction such conduct, which we consider to have been in flagrant disregard of the law, others will be encouraged to pursue a like course and to present a *fait accompli* for our approval. Obviously, such is not in accord with the intent of the statute; i.e., that we pass upon "proposed" acquisitions of control prior to their consummation, including the justness and reasonableness of the terms upon which such control is to be acquired. If the indicated practice were generally followed, our administration of the statute in the public interest would be seriously hindered, if not defeated.

The fact that Alleghany placed the outstanding stock of Jones and Erie in trust immediately after acquiring it does not constitute, in my opinion, such a profusion of good faith so as to warrant condonation of the unlawful purchase. Alleghany is presently subject to partial regulation by the Commission and it is inconceivable to me that its officers and counsel did not know of the requirements of section 5.

Alleghany's principal business is in investing in stock interests in other companies and the transactions proposed in this proceeding would not change this situation. I do not believe it was the intent of Congress that this Commission enter into the field of regulation of companies whose principal business is other than that of public carriage, except where necessary in furtherance of the national transportation policy. I cannot find that need here. See *Edward Hines Lbr. Co. Merger*, 312 I.C.C. 364, 367.

Furthermore, the report of the majority clearly recognizes the dangers inherent in Alleghany becoming a motor carrier. The
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report goes to great lengths to soften the impact by conditions which would, among other things, assure that Alleghany could not control Penn Central. The report rationalizes the real reason for the transaction, i.e., the tax benefits by accepting Alleghany's statement that it will reinvest such benefits to improve the operations of Jones.

This Commission has consistently found in its regulation of security issues that carriers should be prohibited from issuing securities for noncarrier purposes. Its sole departure from that rule was the approval in 1962 of a stock issue by Greyhound Corporation for the purpose of acquiring the stock of a noncarrier, Boothe Leasing Corporation. In later cases the Commission reaffirmed its position against capitalization of noncarrier property, pointing out that even in the Greyhound-Boothe Leasing case the carriers' investment in carrier property was adequate to support Greyhound's increased capitalization resulting from the stock exchange.

Following consummation of the instant case, Alleghany would be grossly overcapitalized by Commission standards for motor carriers. Had the situation been reversed, i.e., had Alleghany first acquired motor carrier rights, it is doubtful that it would have obtained Commission approval for the issuance of securities to acquire its noncarrier investments. Although there are no securities involved in consummating the instant case, any securities which Alleghany may issue in the future would be subject to Commission approval even though the purpose of such issue would probably be noncarrier and outside of the Commission's transportation expertise. The majority report refers to the salutary effect of tax benefits when such benefits are to be reinvested in the carrier business. We have no assurance that such reinvestment would be made. Sound business practice would dictate that Alleghany invest its money in whichever of its investments offers the best return. While the Commission has approved diversification by motor carrier holding companies, it has adhered to the principle that carriers' investments in nontransportation properties should be limited. Approval of this case is a dangerous departure from that principle.

COMMISSIONER TIERNEY did not participate.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 27th day of January 1970.

No. MC-F-10444

ALLEGHANY CORPORATION—CONTROL AND PURCHASE—
JONES MOTOR CO., INC.—AND CONTROL ERIE TRUCKING
COMPANY

Finance Docket No. 25686

JONES MOTOR CO., INC., STOCK

Finance Docket No. 18656

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD
COMPANY MERGER, ETC.

No. MC-FC-70907

ALLEGHANY CORPORATION, TRANSFEREE, JONES MOTOR
COMPANY, INC., TRANSFEROR

Investigation of the matters and things involved in these proceedings having been made, and said Commission on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That acquisition by Alleghany Corporation of the operating rights and property of Jones Motor Company, Inc., and its subsidiary, Erie Trucking Company, merger of Alleghany Trucking Company, a wholly owned subsidiary of Alleghany Corporation, into Jones Motor Company, Inc., and the merger of Jones Motor Company, Inc., into Alleghany Corporation for ownership, management, and operation, and acquisition by Fred M. Kirby and Allan P. Kirby, Jr., individually and as co-guardians of the property of Allan P. Kirby, an incompetent, of control of the operating rights and property through the transaction, approved and authorized upon the terms and conditions set forth in the said report of the Commission.

It is further ordered, In Finance Docket No. 25686, that Jones Motor Company, Inc., be, and it is hereby, authorized to issue not exceeding 100 shares of its common stock, par value \$1 per share, for the purposes and upon the conditions set forth in the said report.

It is further ordered, That in Finance Docket No. 18656, the prior orders of the Commission dated March 2, 1955, and May 24, 1955, be vacated to the extent set forth in the said report.

It is further ordered, In No. MC-FC-70907, that the application be, and it is hereby, dismissed.

It is further ordered, That if the parties to the transaction herein authorized desire to consummate same, they shall (1) promptly take such steps as will insure compliance with sections 215, 217, and 221(c) of the Interstate Commerce Act, and with the rules, regulations, and requirements prescribed thereunder, and (2) confirm in writing to this Commission immediately after this consummation the date on which consummation has actually taken place.

It is further ordered, That if the authority herein granted is exercised, Alleghany Corporation shall submit for consideration a sworn statement, and one copy thereof, hereby required, within 60 days after the consummation of the transaction, showing all expenditures made in connection with the transaction authorized, including the consideration, legal and other fees, commission, and any other costs incidental to the transaction, the assets acquired and liabilities assumed, including loans incurred to consummate the transaction, indicating the account number and title to which each item has been, or is to be, debited or credited.

It is further ordered, That Jones Motor Company, Inc., shall report concerning the matters involved in Finance Docket No. 25686 in conformity with the order of the Commission, division 3, dated May 20, 1964, as amended, respecting applications filed under section 214 of the act (49 CFR 1115.6).

It is further ordered, That except as authorized in Finance Docket No. 25686, the common stock authorized to be issued shall not be sold, pledged, repledged, or otherwise disposed of

by Jones Motor Company, Inc., unless and until so ordered or approved by this Commission.

It is further ordered, That nothing herein shall be construed to imply any guarantee or obligation as to said stock, or dividends thereon, on the part of the United States.

It is further ordered, That recital, in said report, of financial data shall not be construed as approval of accounting methods which have been followed or expenditures represented thereby.

It is further ordered, That this order shall be effective on the date it is served.

And it is further ordered, That unless the authority herein granted is exercised within 180 days from the effective date of this order, this order shall be of no further force or effect.

By the Commission.

H. NEIL CARSON,
Secretary.

(SEAL)

Accts rec. net.....	19,399
Inventories.....	948
Prepayments.....	1,651
Defr inc tax bene- fits.....	1,093
Tax refund.....	2,055
Tot curr assets.....	25,600
Net property.....	31,131
Defr inc tax bene- fits.....	3,189
Noncurr. assets re- lated to discont oper.....	3,584
Oth assets.....	63,504
Liabilities.....	
Cur debt & oth liab mat.....	270
Accts pay & accrs income taxes.....	9,396
Res for estim ad- diti costs of dis- cont opers.....	403
Tot curr liab.....	10,074
Long term debt.....	12,756
Oth liab.....	504
Com. s'k n.p.....	9,454
Paid-in surp.....	4,505
Retain. earns.....	26,211
Tot liab.....	63,504
New wkg cap.....	15,526
Equity per sh.....	28,273
Dep res.....	3,781,570
TSAs.....	
aReclassified.....	

20,759 in the states of Conn., Ill., Mass., Mich., Pa., N. H., R. I. and Va. Revenue equipment owned by Jones Motor at July 1, 1973, included 145 trucks, 1,018 tractors, and 2,251 trailers. Dec. 31, 1973, Jones operated over 9,000 certificated route miles connecting 22 states and D. C., and was serviced by 46 general and 35 special commodity division terminals.

INVESTORS DIVERSIFIED SERVICES, INC.
28% of equity interest and 44% of voting power owned in the investment adviser and distributor for seven mutual funds, and the Jones Motor Division, sells investment certificates and engages in mortgage banking and the sale and lease of real estate.

Dec. 31, 1973, net assets of the mutual funds totaled \$5.9 billion, and certificates in force totaled \$2.1 billion. In 1974, Investors sold its investment banking subsidiary, and planned to also sell its industrial leasing subsidiary.

REAL ESTATE OPERATIONS--Alleghany owns the Court House Square real estate development in Denver, which includes a 880 room hotel leased to Hilton Hotels Corp., a 1,200 car underground garage, and a department store leased to May Department Stores Co. At Dec. 31, 1973, the property was carried at \$15,496,092, after deducting \$14,131,889 unassumed mortgage debt and \$13,959,245 depreciation.

INCORPORATED in Md. Jan. 26, 1929, by the late Van Sweringen Bros. as an investment Co. Aug. 1 '63 sold 72% stock interest in Savill-Mahaffey Mtge. Co. for \$1,230,828, or net profit of \$71,365; subsidiary was purchased Sept. 7 '62. Mar. 18 '64 sold its 235,000 Com. shareholdings (acquired in 1960-64) of Baltimore & Ohio RR to Chesapeake & Ohio Ry. for \$9,530,778, or net profit of \$1,530,804.

Mar. 18 '66 Co. surrendered its 50.36% stock interest (acquired in June '63 for \$2,300,000) in Land Value Corp. (name changed to Roosevelt Office Center, Inc., in 1967) for a \$2,783,612 (representing its investment therein) 5% 1st Mtge. Note, paid in 1968. The exchange was made pursuant to an agreement entered into in Dec. '64 between Co., Roosevelt, and Lomas & Nettleton Financial Corp., which owned the remaining 49.64% stock of Roosevelt.

In 1968, sold investments in Cal. Western States Life Ins. Co. (150,000 Cap. shs.) for \$4,500,000; Commonwealth Life Ins. Co. (5,000 Cap. shs.) for \$112,875; and Transamerica Corp. (104,000 Com. shs.) for \$5,585,871. Oct. 1, 1968, acquired 805,946 Com. shs. (98.2% and all 5% Cum. Pfd. shs. of Jones Motor Co., Inc., for \$13,342,998. Latter was merged into Co. Apr. 30, 1970.

OFFICERS
F. M. Kirby, Chrm & Pres
J. J. Burns, Jr., V-P--Finance
J. C. Horton, V-P Secy & Treas
T. E. Somerville, V-P & Counsel
Paul Woodberry, V-P

DIRECTORS
R. K. Gottshall
C. T. Hill
C. J. Routh
J. J. Burns, Jr.
J. E. Tobin
A. P. Kirby, Jr.
W. G. Rabe
R. G. Hough
S. A. Zimmerman
OFFICES--350 Park Ave., NYC 10022 (Tel.: 212-752-1356). ANNUAL MEETING--in Apr.

STOCK DATA

WARRANTS--For each share of \$5.50 Ser. A Pfd. exchanged for \$100 of 5% S. F. Ser. A Debts, due Nov. 1, 1962, under an offer made in Oct., 1952, there were issued 20 perpetual warrants, or 2,000,000 perpetual warrants. Each warrant entitles holder to purchase one Com. share at \$3.75 in perpetuity. Terms and trading basis should be checked in detail.

PRE-EMPTIVE RIGHTS--Common stockholders have preemptive rights.
6% CONV. PFD. (\$10 Par) REDEEMED May 4 '70 at \$10.50 and accrued divd. of \$0.05/a share. There were 1,367,440 shares issued, including 1,323,400 in 1955 in exchange for 132,344 \$5.50 Ser. A Pfd. (\$100 par) shares. Thru 1969, a total of 1,139,062 shs. had been converted into Com. (4.7 Com. shs. plus \$3.75 cash for each Com. sh.) and remaining 236,745 shs. were converted by Apr. 28 '70 or redeemed May 4 '70.

STOCKHOLDERS--Dec. 31, 1973, 8,189 (of record). Feb. 15, 1974, A. P. Kirby, Jr., F. M. Kirby, and members of their families owned or controlled 54.6% of the Com.

TRANSFER AGENTS--Chemical Bank, NYC, and Central National Bank, Cleveland, REGIS-TRARS--Manufacturers Hanover Trust Co., NYC, and Cleveland Trust Co.

LISTED--Com.--NYSE (Symbol--Y); Com. also traded Boston, PBW, Midwest, Detroit, Cincinnati,

and Pacific SEs, Perpetual Warrants Listed on American SE; traded Pacific SE:

--Warran. 7--					
1973.....	10%	4%	1987.....	12%	5%
1972.....	11%	6%	1986.....	12%	5%
1971.....	14%	7%	1985.....	10%	5%
1970.....	10%	3%	1984.....	10%	6%
1969.....	24%	9%	1983.....	9%	6%
1968.....	24%	9%	1982.....	9%	3%
---Common---					
1973.....	14%	7%	1987.....	14%	7%
1972.....	14%	9%	1986.....	16%	7%
1971.....	18%	9%	1985.....	13%	8%
1970.....	13%	4%	1984.....	13%	9%
1969.....	28%	11%	1983.....	13%	9%
1968.....	28%	12%	1982.....	12%	5%

RECENT DIVIDENDS: Com. \$1 par--\$

June 14, 1974.....	0.20
1973.....	0.36
1972.....	0.2808
1971.....	0.27
1968-66	0.20
1965.....	NIL
1964.....	0.20
1963.....	0.11
1962.....	NIL

6% Pfd. \$10 par--\$1.75 initial Aug. 6 '58, clearing arrears thru Apr. 30 '58; \$0.30 semi-annually after, beginning Oct. 1 '58; to redempt at \$10.50 a share & \$0.05/a divd. on May 4, 1970.

DIVIDEND RESTRICTION--Under most restrictive covenant of the bank credit agreement regarding dividends, unrestricted retained earnings at Dec. 31, 1973, amounted to \$24,364,276.

EARNINGS AND FINANCES

AUDITORS--Peat, Marwick, Mitchell & Co. EARNINGS, Yrs. End, Dec. 31: \$

---Financial Opers.---

Total Inc. Int. Net Inc.

1973--Income Account Published Below--

1972.....	14,758,000	1,025,000	10,055,000
1971.....	15,710,000	1,075,000	10,563,000
1970.....	8,742,000	1,025,000	3,595,000
1969.....	8,875,122	1,193,438	3,771,823
1968.....	8,711,811	1,411,325	3,644,848

---Motor Carrier Opers.---

Oper. Inc. Net Inc.

Revs. Taxes Inc.

1972.....	77,540,000	.....	1,300,000
1971.....	63,699,000	.....	1,299,000
1970.....	63,699,000	270,000	1,029,000
1969.....	57,715,796	cr410,700	dl,828,680
1968.....	57,105,486	299,150	714,900

Inc. cNet cbSh.

Taxes Inc. Earnings.

1972.....	2,187,000	9,168,000	0.99
1971.....	2,410,000	9,452,000	1.08

---Net Invest. Inc.---

Amount b Per Sh.

1971.....	cr4,624,000	cr0.53
1970.....	1,943,143	0.23
1969.....	cr4,359,748	0.52

Total Fed. Inc. a Avail. for

Inc. Inc.

1968.....	8,834,843	.....	5,021,821
1967.....	8,364,022	.....	4,319,402
1966.....	8,579,803	.....	4,042,313
1965.....	9,779,889	.....	5,455,068
1964.....	8,086,708	.....	3,593,400
1963.....	8,041,163	201,145	3,417,721
1962.....	7,217,845	.....	cr2,646,676
1961.....	4,804,031	.....	800,508
1960.....	3,688,884	.....	2,944,049

Fxd. Times Net Invest.

Chgs. Earn. Income

1968.....	1,624,342	3.09	3,397,479
1967.....	1,771,377	2.44	2,548,025
1966.....	1,938,638	2.09	2,103,680
1965.....	1,781,765	3.06	3,676,303
1964.....	415,031	8.66	3,178,369
1963.....	464,496	7.36	2,953,225
1962.....	501,136	5.22	2,145,540
1961.....	580,622	1.55	319,886

---Net Invest. Inc. Per Sh.---

%6% ---Com.---

Pfd. b Rptd. *Outstg.

1968.....	13.69	0.43	0.45
1967.....	7.48	0.34	0.35

---Net Invest. Inc. Per Sh.---

Pr. Pfd. 6% Pfd. \$5.50 Pfd. Com.

1968.....	.....	.....	0.28
1967.....	.....	.....	0.34
1966.....	.....	.....	0.28
1965.....	.....	.....	0.27
1964.....	.....	.....	0.19
1963.....	.....	.....	0.001

Security Unreal. Net Asset

Profit Apprec. Value

1972.....	2,657,000	34,288,000	192,036,000
1971.....	441,000	29,303,000	177,159,000
1970.....	441,000	24,945,000	180,633,000
1969.....	1,800,753	cr9,438,143	151,992,349
1968.....	2,641,265	cd7,826,401	155,488,194
1967.....	1,252,227	55,733,055	209,663,616
1966.....	724,572	27,688,506	150,686,547
1965.....	.....	cr1,425,387	112,006,106
1964.....	.....	29,032,284	226,081,912
1963.....	1,528,818	31,910,270	193,416,260

Alleghany Corp.

CAPITALIZATION (Dec. 31 '73)

LONG TERM DEBT--\$6,000,000 due to banks, with int. at 4% above prime rate; paid Jan. 21, 1974.

STOCK--

\$4 Cum. Conv. Pr. Auth. Shs. Outstg. Shs.

Pfd, no par..... 28,367 None

Pfd, \$100 par..... 1,500,000 None

6% Cum. Conv. Pfd. 1,367,440 None

*Incl. 493,800 for warrants; 33,000 optioned to employees; with 61,700 for future grants; and 200,000 for performance share plan.

*Excl. 564,640 in treas.

CORPORATE BACKGROUND

Company primarily holds substantial stock interests in other companies, mainly Investors Diversified Services, Inc., 44% of the voting power owned, non-consolidated, and distributes Jones Motor Division, is a trucking common carrier. It also owns a large real estate development in Denver, Colo., and is subject to regulation under the ICC.

Aug. 21, 1970, SEC ruled that Co. had ceased to be a registered investment concern.

SECURITIES OWNED, Dec. 31, 1973:

	Shares	Cost	Mkt.
	-----Thou. \$-----		
Investors Diversified Services, Inc.:			
Cl. A & B Com	b	15,095	41,609
Mo. Pac. RR:			
Cl. A.....	a2,200	88	180
Cl. B.....	a21,243	*3,512	44,610
USM Corp.:			
Com.....	e930,800	17,048	16,056
TI Corp. (of Cal.):			
Com.....	400,000	10,518	7,100
Pittston Co.:			
Com.....	c53,045	1,630	1,286
United Corp.:			
Com.....	353,000	3,448	3,045
Total.....		51,339	113,886

*After reserve of \$23,082,799.

a All deposited with an independent voting trustee, as per ICC directive. Under Jan. 21, 1974, recapitalization settling litigation begun in 1967, all Cl. B shares of Mo. Pac. held by Co. were exchanged for \$18,056,550 cash and 339,888 new Mo. Pac. Com. shs., of which 243,623 shs. were sold for \$24,362,300 cash; and each Cl. A share was converted to one \$5 Cum. Conv. Pfd. sh., convertible into one Com. sh. after Dec. 14, 1974.

b Represents 493,815 Cl. A shs. and 6,313,660 Cl. B shs.

c All deposited with an independent voting trustee.

e In 1974, increased to 1,241,500 Com. shs., all sold in July, 1974, for \$31,000,000--\$13,189,213 cash, \$13,994,751 in Notes, and 62,000 Com. shs. of Monsanto Co.

JONES MOTOR DIVISION is a common carrier of general commodities by motor vehicle, operating under regular and irregular ICC route authorizations. It also holds certain intrastate rights granted by the regulatory authorities

See Docketed Papers #8, Joint answer of U.S.A. & I.C.C., Dec. 14, 1975
Order of the ICC, F.D. #27346, p. 61, Alleghany Corp. - Control & Purchase -
Jones Motor Co., Inc. 109 M.C.C. 333, #MC-F 10444, pages 333-358. See also Brief
Of Alleghany In Support Of Application 20a, to ICC, Oct. 6, 1973, pages 9-11.
Alleghany Corp. Corporate Background

(1) Alleghany Corporation, through its Jones Motor Division, is a trucking common carrier, and is subject to regulation under the ICC, as shown above. On August 21, 1970, SEC ruled that the Company had ceased to be a registered investment concern. (The ICC incapable of protecting investors)

(2) Alleghany's 21,243 Class B Shares were all deposited with an independent voting trustee, as per ICC directive.

(3) Company primarily holds substantial stock interests in other companies, mainly Investors Diversified Services, Inc., 44% of the power voting owned, non-consolidated.

(4) Investor's Diversified Services, Inc., 28% of equity interest and 44% of voting power owned, is the investment adviser and distributor for seven mutual funds, and thru subsidiaries sells investment certificates and life insurance, engages in mortgage banking and financing, and owns real estate. (5) Dec. 31, 1973, net assets of the mutual funds totaled \$5.9 billion, and certificates in force totaled \$2.1 billion.

(ALLEGHANY SOLD HER MOPAC B TO REMAIN AS MOTOR CARRIER UNDER ICC)

44-10% Real Est. Mbs., due thru 1994..... 99,408,032
 7% Subord. Cap. Debs. of IDS Financial Corp., due May 31 '81.... 19,118,000
 4 7/8-7 7/8 Subord. Notes & Debs., to 1981..... 753,500
 4 7/8-10 1/4 Notes, due thru 1989..... 11,970,453
 6 7/8-7 7/8 Debs., to 1991..... 7,602,035
 Notes, to 1984..... 2,300,000
 Other, to 2007..... 3,656,400
TOTAL (incl. \$9,611,832 curr.)... \$179,808,420
 *Int. at prime rate to 2% above.

STOCK--
 Pfd. \$0.10 par..... 1,000,000
 \$3.50 Conv. Ser. D..... 212,500
 Cl. A Com. \$2 par... 16,500,000
 Cl. B Com. \$0.50 par 14,000,000
 Incl. 210,250 optioned to employees, with 39,750 for future grants; and 752,500 for conversion of Debs.

Converted Jan. 24, 1974 into 20,000 Com. Cl. A shs.

REVOLVING CREDIT AGREEMENT provides up to \$35,000,000, with int. at 11 1/2% of prime rate to July 1, 1974 & 12 1/2% of prime rate to July 1, 1975; commitment fee of 2 1/2% of prime rate on unused portion. At July 1, 1975, borrowings are convertible into a 5-yr. term loan, with int. at 12 1/2% of prime rate. Dec. 31, 1973, \$20,000,000 was taken down.

CHANGE IN DOMICILE APPROVED-- Apr. 17, 1974, stockholders approved a proposal whereby Co. would be merged into wholly owned IDS Delaware, Inc., a Del. concern. Upon completion, latter's name would be changed to that of Co. Survivor would have authorized capitalization consisting of 6,500,000 Com. Cl. A shs., \$2 par, 10,000,000 Com. Cl. B shs., \$0.50 par, and 1,000,000 Pfd. shs., \$0.10 par. Under terms of the merger, consummation could be delayed until no later than Dec. 31, 1975.

CORPORATE BACKGROUND

Company and subsidiaries sell and issue investment certificates, manage and distribute mutual funds, conduct insurance, securities brokerage, and financing operations, including commercial financing and mortgage banking; provide investment advisory services to pension funds, pools of privately-owned capital, and a real estate investment trust; sell limited partnership interests in oil and gas exploration programs; and own and operate real properties. Subsidiaries formerly also conducted investment banking, corporate and municipal bond underwriting, and equipment leasing activities until Mar. and Nov., 1974, respectively, when such operations were sold.

In 1973, investment certificates accounted for 66% of income from continuing operations, mutual funds 17%, insurance 30%, investment banking 1%, and finance operations 14% (loss).

Investment certificates are issued in all states and D. C. thru wholly owned Investors Syndicate of America, Inc. Dec. 31, 1973, certificates in force totaled \$2.1 billion.

IDS Life Insurance Co., wholly owned, conducts a regular and group life insurance, health insurance, and variable annuity business in 49 states and D. C. Dec. 31, 1973, insurance in force totaled \$5 billion. Also, its wholly owned IDS Life of New York issues life insurance in that state, and at Dec. 31, 1973, had \$57 million of life insurance in force.

Mutual funds managed and distributed include Investors Mutual, Inc., the world's largest (\$2.402,000,000 net asset value at Dec. 31, 1973); Investors Selective Fund, Inc. (\$98,000,000); Investors Stock Fund, Inc. (\$2,188,000,000); Investors Variable Payment Fund, Inc. (\$783,000,000); IDS New Dimensions Fund, Inc. (\$248,000,000); IDS Progressive Fund, Inc. (\$188,000,000); and IDS Growth Fund, Inc. (\$18,000,000).

Other subsidiaries include IDS Advisory Corp., IDS Financial Corp., IDS Mortgage Corp., IDS Oil Programs, Inc., IDS Properties, Inc., and IDS Securities Corp.

EMPLOYEES-- Dec. 31, 1973, 3,300. INCORPORATED in Minn. in 1894 as Investors Syndicate, and is under supervision of Minn. Banking Department. It has complied with the applicable laws, if any, for the sale of securities in all other states and D. C. Present title adopted Mar. 30, 1949.

In June, 1967, IDS Leasing Corp., subsidiary, acquired the assets of Security Leasing Co., Salt Lake City, which leased income producing equipment to others.

Jan. 2, 1968, IDS Properties Inc., subsidiary, acquired real estate in Minn. and Fla. and other assets of Baker Properties, Inc. for \$41,000,000--\$9,900,000 cash and short term notes; \$31,600,000 assumption of debt, including \$28,000,000 due to a subsidiary and \$9,300,000 long term notes.

In Apr., 1969, Co. transferred its investment in Investors Syndicate Title & Guaranty Co. to Investors Syndicate of America, Inc.

Sept. 15, 1969, acquired all shs. of John Nueven & Co. (Inc.) underwriter and distributor of municipal bonds. Nov. 21, 1969, acquired for 400,000 treas. Cl. A Com. shs. and 50,000 Conv. Pfd. shs. all the net assets and business of Jeffries & Co., Inc., a broker-dealer.

In Feb., 1972, sold IDS Credit Corp., subsidiary to First Bank System, Minneapolis.

OFFICERS

✓ **E. M. Kirby, Chrm.**
C. R. Orem, Pres & Chief Exec Officer

interests of the Commission. The Commission will not protect me as a stockholder in ICC regulated Companies. In addition, the ICC will fight all stockholders who fight for their property rights secured by the Constitution or laws of the U.S. The ICC even uses Page 9825 the Justice Dept. to fight me.

W. B. Boscaw, Sr. V-P
G. A. Mahon, Sr. V-P
W. H. Dudley, Sr. V-P
K. R. Walberg, Sr. V-P
H. C. Whitman, Sr. V-P
J. F. Grunell, V-P & Gen. Counsel
J. W. Buckle, Treas
D. H. Bruer, Secy

--V-Ps--
N. A. Ablahat
J. E. Annett
W. A. Doyle
T. L. Kenealy
J. A. Murray
C. E. Griffith
D. L. Hadaway
J. F. Kelly
J. R. Kohl
K. A. Latta
M. E. Stodghill
H. E. Dinnwiddle
J. A. Murray

--Regional V-Ps--
J. R. Kohl
Benedikt Wenger
L. B. Winters

DIRECTORS--
D. P. Boethe, Jr.
E. N. Funkhouser, Jr.
B. D. Kenna, Jr.
A. P. Kirby, Jr.
V. F. Kirby
J. H. Culbertson

HOME OFFICE-- IDS Tower, Minneapolis, Minn. 55402 (Tel.: 612-372-3131).
MEETING-- In Apr.
Outstg. (Dec. 31, 1973)..... 19,118,000
Retired..... 882,000

BOND DESCRIPTIONS

IDS FINANCIAL CORP., 7% SUBORD. CAPITAL DEBENTURES; Due May 31, 1981
Authorized..... \$20,000,000
Outstg. (Dec. 31, 1973)..... 19,118,000
Retired..... 882,000

INDENTURE DATED June 1, 1971. INTEREST PAYABLE quarterly Jan. 1, etc. **PRINCIPAL & INTEREST PAYABLE** at trustee's office. **INTEREST GRACE PERIOD--** 30 days.

TRUSTEE-- Northwestern Natl. Bank, Minneapolis.

REGISTRAR-- Investors Diversified Services, Inc.

DENOMINATIONS-- Fully registered, \$1,000 & multiples thereof.

REDEMPTION RESERVE FUND & PRIVILEGE
 --Co. is required to make monthly payments into the Redemption Reserve, sufficient to retire all Cap. Debs. outstg. at maturity. Initial payment by Co. shall be an amount equal to 1/120th of the total amount of Cap. Debs., outstg. multiplied by number of full calendar months that have elapsed since June 1, 1971. Co. will have non-cumulative option to make an additional payment equal to required payment. Redemption Reserve may, but need not, be applied to redemption of Cap. Debs. at Co.'s option, provided that, if any such redemption shall be less than all of Cap. Debs. outstg., the Redemption Reserve funds to be used for such redemption shall be limited to such amount as shall be in excess of \$1,000,000.

Prior to May 31, 1981, Cap. Debs. may be presented for payment at holder's election in any amount that shall be a minimum of \$1,000 or multiples thereof for payment from available Redemption Reserve funds. The Cap. Debs. will be paid in full in the order of their receipt by Co. at 100 & int. Payment of principal shall be made from the Redemption Reserve and Co. shall pay all interest accrued thereon. All Cap. Debs. so presented, but not paid due to lack of sufficient Redemption Reserve funds, will be held for payment in the order of their receipt by Co. on the next succeeding payment date that funds are available in the Redemption Reserve. Holder may elect to revoke his election of payment as to the unpaid Cap. Debs.

REDEEMABLE on 30 days' notice at 102 & int.

SECURITY-- A direct unsecured obligation, subordinated to senior debt, as defined.

6 5/8% CONV. SUBORD. (S. F.) DEBS.; Due Jan. 1, 1992

(S & P Rating--BB)
Auth. & Outstg. (Dec. 31, 1973)..... \$35,000,000

INDENTURE DATED Jan. 1, 1972. INTEREST PAYABLE Jan. & July 1, to holders registered preceding Dec. 31 & June 30, respectively. **PRINCIPAL & INTEREST PAYABLE** at trustee's office. **INTEREST GRACE PERIOD--** 30 days.

TRUSTEE-- Morgan Guaranty Trust Co., NYC.

DENOMINATIONS-- Fully registered, \$1,000 & multiples hereof.

SINKING FUND requires retirement on 30 days notice at 100 & int. on each Jan. 1, 1983-91.

of 10% Debs. outstg. Dec. 31, 1981. Co. having non-cumulative option to retire additional Debs. in each such years up to the mandatory requirement. Optional redemptions may not be used to reduce mandatory requirements. Credit may be taken for Debs. otherwise acquired or converted.

REDEEMABLE OTHERWISE on 30 days' notice at the following prices & int. thru each Dec. 31; with price declining each year after to 100: 1974.... 105.78 1975.... 105.42 1976.... 105.06 1977.... 104.70 1978.... 104.34 1979.... 103.98 1980.... 103.62 1981.... 103.26 1982.... 102.90 1983.... 102.54 1984.... 102.18 1985.... 101.82 1986.... 101.46 1987.... 101.10 1988.... 100.74 1989.... 100.38 1990.... 100.02 1991.... 99.66 1992.... 99.30 1993.... 98.94 1994.... 98.58 1995.... 98.22 1996.... 97.86 1997.... 97.50 1998.... 97.14 1999.... 96.78 2000.... 96.42 2001.... 96.06 2002.... 95.70 2003.... 95.34 2004.... 94.98 2005.... 94.62 2006.... 94.26 2007.... 93.90 2008.... 93.54 2009.... 93.18 2010.... 92.82 2011.... 92.46 2012.... 92.10 2013.... 91.74 2014.... 91.38 2015.... 91.02 2016.... 90.66 2017.... 90.30 2018.... 89.94 2019.... 89.58 2020.... 89.22 2021.... 88.86 2022.... 88.50 2023.... 88.14 2024.... 87.78 2025.... 87.42 2026.... 87.06 2027.... 86.70 2028.... 86.34 2029.... 85.98 2030.... 85.62 2031.... 85.26 2032.... 84.90 2033.... 84.54 2034.... 84.18 2035.... 83.82 2036.... 83.46 2037.... 83.10 2038.... 82.74 2039.... 82.38 2040.... 82.02 2041.... 81.66 2042.... 81.30 2043.... 80.94 2044.... 80.58 2045.... 80.22 2046.... 79.86 2047.... 79.50 2048.... 79.14 2049.... 78.78 2050.... 78.42 2051.... 78.06 2052.... 77.70 2053.... 77.34 2054.... 76.98 2055.... 76.62 2056.... 76.26 2057.... 75.90 2058.... 75.54 2059.... 75.18 2060.... 74.82 2061.... 74.46 2062.... 74.10 2063.... 73.74 2064.... 73.38 2065.... 73.02 2066.... 72.66 2067.... 72.30 2068.... 71.94 2069.... 71.58 2070.... 71.22 2071.... 70.86 2072.... 70.50 2073.... 70.14 2074.... 69.78 2075.... 69.42 2076.... 69.06 2077.... 68.70 2078.... 68.34 2079.... 67.98 2080.... 67.62 2081.... 67.26 2082.... 66.90 2083.... 66.54 2084.... 66.18 2085.... 65.82 2086.... 65.46 2087.... 65.10 2088.... 64.74 2089.... 64.38 2090.... 64.02 2091.... 63.66 2092.... 63.30 2093.... 62.94 2094.... 62.58 2095.... 62.22 2096.... 61.86 2097.... 61.50 2098.... 61.14 2099.... 60.78 2100.... 60.42 2101.... 60.06 2102.... 59.70 2103.... 59.34 2104.... 58.98 2105.... 58.62 2106.... 58.26 2107.... 57.90 2108.... 57.54 2109.... 57.18 2110.... 56.82 2111.... 56.46 2112.... 56.10 2113.... 55.74 2114.... 55.38 2115.... 55.02 2116.... 54.66 2117.... 54.30 2118.... 53.94 2119.... 53.58 2120.... 53.22 2121.... 52.86 2122.... 52.50 2123.... 52.14 2124.... 51.78 2125.... 51.42 2126.... 51.06 2127.... 50.70 2128.... 50.34 2129.... 49.98 2130.... 49.62 2131.... 49.26 2132.... 48.90 2133.... 48.54 2134.... 48.18 2135.... 47.82 2136.... 47.46 2137.... 47.10 2138.... 46.74 2139.... 46.38 2140.... 46.02 2141.... 45.66 2142.... 45.30 2143.... 44.94 2144.... 44.58 2145.... 44.22 2146.... 43.86 2147.... 43.50 2148.... 43.14 2149.... 42.78 2150.... 42.42 2151.... 42.06 2152.... 41.70 2153.... 41.34 2154.... 40.98 2155.... 40.62 2156.... 40.26 2157.... 39.90 2158.... 39.54 2159.... 39.18 2160.... 38.82 2161.... 38.46 2162.... 38.10 2163.... 37.74 2164.... 37.38 2165.... 37.02 2166.... 36.66 2167.... 36.30 2168.... 35.94 2169.... 35.58 2170.... 35.22 2171.... 34.86 2172.... 34.50 2173.... 34.14 2174.... 33.78 2175.... 33.42 2176.... 33.06 2177.... 32.70 2178.... 32.34 2179.... 31.98 2180.... 31.62 2181.... 31.26 2182.... 30.90 2183.... 30.54 2184.... 30.18 2185.... 29.82 2186.... 29.46 2187.... 29.10 2188.... 28.74 2189.... 28.38 2190.... 28.02 2191.... 27.66 2192.... 27.30 2193.... 26.94 2194.... 26.58 2195.... 26.22 2196.... 25.86 2197.... 25.50 2198.... 25.14 2199.... 24.78 2200.... 24.42 2201.... 24.06 2202.... 23.70 2203.... 23.34 2204.... 22.98 2205.... 22.62 2206.... 22.26 2207.... 21.90 2208.... 21.54 2209.... 21.18 2210.... 20.82 2211.... 20.46 2212.... 20.10 2213.... 19.74 2214.... 19.38 2215.... 19.02 2216.... 18.66 2217.... 18.30 2218.... 17.94 2219.... 17.58 2220.... 17.22 2221.... 16.86 2222.... 16.50 2223.... 16.14 2224.... 15.78 2225.... 15.42 2226.... 15.06 2227.... 14.70 2228.... 14.34 2229.... 13.98 2230.... 13.62 2231.... 13.26 2232.... 12.90 2233.... 12.54 2234.... 12.18 2235.... 11.82 2236.... 11.46 2237.... 11.10 2238.... 10.74 2239.... 10.38 2240.... 10.02 2241.... 9.66 2242.... 9.30 2243.... 8.94 2244.... 8.58 2245.... 8.22 2246.... 7.86 2247.... 7.50 2248.... 7.14 2249.... 6.78 2250.... 6.42 2251.... 6.06 2252.... 5.70 2253.... 5.34 2254.... 4.98 2255.... 4.62 2256.... 4.26 2257.... 3.90 2258.... 3.54 2259.... 3.18 2260.... 2.82 2261.... 2.46 2262.... 2.10 2263.... 1.74 2264.... 1.38 2265.... 1.02 2266.... 0.66 2267.... 0.30 2268.... 2269.... 2270.... 2271.... 2272.... 2273.... 2274.... 2275.... 2276.... 2277.... 2278.... 2279.... 2280.... 2281.... 2282.... 2283.... 2284.... 2285.... 2286.... 2287.... 2288.... 2289.... 2290.... 2291.... 2292.... 2293.... 2294.... 2295.... 2296.... 2297.... 2298.... 2299.... 2300....

SECURITY-- A direct unsecured obligation, subordinated to superior debt as defined.

LISTED-- American SE, Mar. 29, 1972; also listed Pacific SE--

1973..... 97 63 1972..... 111 1/4 89

STOCK DATA

CL. A (\$2 par) & CL. B (\$0.50 par) COM. are identical except that each Cl. A share is entitled to four times the amt. of cash distributions or liquidation payments made on Cl. B. Stock dividends are payable only in like amounts in respective classes. **VOTING POWER--** Each class has one vote per share.

RECENT CAPITAL CHANGES-- May 6 '64 authorized capital stock changed from 1,300,000 shs. of \$1 par (non-voting) Cl. A Com. and 700,000 of \$1 par (voting) Com. to 6,500,000 of \$2 par Cl. A Com. and 14,000,000 of \$0.50 par Cl. B Com., both voting, and the Cl. A and Com. outstg. split 5-for-1 and 20-for-1, respectively.

STOCKHOLDERS-- Dec. 31, 1973 (of record): Pfd. 52; Cl. A, 6,544; Cl. B, 5,175. **Allegheny Corp.** owned 495.81 Cl. A shs. and 6,313.66 Cl. B shs., or 44.4% of the total voting power. Feb. 15, 1974, Allegheny Corp. is controlled by the Kirby family.

TRANSFER AGENTS-- Chemical Bank, NYC; First National Bank, Minneapolis. **REGISTRARS--** Manufacturers Hanover Trust Co., NYC; First National Bank, Minneapolis.

LISTED-- American (Symbol IDS) and Pacific SEs May 25 '66; OTC prior thereto--

	Cl. A \$2 par	Cl. B \$0.50 par
1973.....	36 1/2	20 1/4
1972.....	48 1/2	31 1/2
1971.....	62 1/2	35 1/2
1970.....	38	20 1/2
1969.....	58 1/2	31 1/2
1968.....	62	32 1/2
1967.....	41 1/2	30 1/2
1966.....	47	26 1/2
1965.....	57 1/2	41 1/2
1964.....	59 1/2	48 1/2
1964 (to May 6)	278	266

DIVIDENDS (\$)--

	Cl. A \$2 par	Cl. B \$0.50 par
1974 (to Dec. 31)...	1.80	0.45
1973-67.....	1.80	0.45
1966.....	1.65	0.41 1/4
1965.....	1.60	0.40
1964.....	1.20	0.30

--Cl. A & Com. \$1 par--

1964..... 2.00

Dividends have been paid continuously since 1957; prior years not available.

DIVIDEND RESTRICTIONS-- Under the terms of a revolving credit agreement, \$38,000,000 of retained earnings, at Dec. 31, 1973, was available for payments on or for Co.'s stock.

EARNINGS AND FINANCES

AUDITORS-- Peat, Marwick, Mitchell & Co. (Minneapolis).

CONSOL. EARN. Yrs. End. Dec. 31: \$

	Gross Inc.	Fed. Inc. Tax	Net Published Below
1972.....	259,219,000	9,360,000	36,094,000
1971.....	251,331,000	12,104,000	35,872,000
1970.....	229,928,000	6,154,000	28,388,000
1969.....	211,426,000	6,736,000	28,846,000
1968.....	213,237,000	5,868,000	23,262,000
1967.....	195,356,000	9,426,000	25,712,000
1966.....	179,676,710	6,119,000	23,318,612
1965.....	145,121,044	5,201,000	21,817,186
1964.....	140,484,807	4,931,000	21,735,143

--Cl. A-- **--Cl. B--** **--Gain on Invest.**

	1972	1971	1970	1969	1968	1967	1966	1965	1964
1972	4.91	1.23	1.21	0.98	0.94	0.82	0.82	0.82	0.82
1971	4.86	1.21	0.98	0.94	0.82	0.82	0.82	0.82	0.82
1970	3.93	1.21	0.98	0.94	0.82	0.82	0.82	0.82	0.82
1969	3.75	1.21	0.98	0.94	0.82	0.82	0.82	0.82	0.82
1968	3.27	1.23	0.98	0.82	0.82	0.82	0.82	0.82	0.82

The ICC petitioned Alleghany to divest itself of MoP Class B (See p. 350) holdings in order to remain as a motor carrier. See my Item #2, Jones Motor.

(2a) The above vast holdings of Alleghany Corporation are only some of the reasons why Alleghany was obliged to sell its MoPac securities of Class B in order to remain as a motor carrier under the ICC's jurisdiction so as to save itself from the 70% annual IRS penalty tax, in addition to being under the ICC's jurisdiction, which in its present posture is incapable of protecting the interests of the public investors. The Federal securities laws, which safeguards investors, contains an exemption for ICC regulated Cos. All is not an SEC Federal securities laws regulated Co. This is profitable.

Alleghany Corp.

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Stock—	Price Aug. 27 75	Dividend	Yield
COMMON	7 1/4	\$0.45	6.1%
PERPETUAL WARRANTS	4 1/2	None	None

SUMMARY: During 1974, Alleghany Corp. converted from an investment company to an operating company. Sizeable profits were realized in 1974 from the sale of holdings of Missouri Pacific Railroad and USM Corp. and a 95% interest in MSL Industries was acquired. The company has a substantial interest in Investors Diversified Services. With the shift to operating status, earnings will gain in importance as a determinant of value.

PROSPECTS

The company has stated that reported earnings for 1974 must be regarded as a special case, not as a standard by which future years can be judged. The significant gains on securities transactions and dividend income of 1974 are not expected to be repeated in 1975. This should, in part, be offset by the probable absence of substantial property and marketable securities 'writedowns' made in 1974. The Jones Motor division operations should be adversely impacted by the recession. Likewise, operations of the important Investors Diversified Services could be adversely affected by the unsettled financial markets. However, inclusion of MSL Industries (net earnings of \$12.2 million in 1974 and possibly higher in 1975) should provide an offset. Thus, a comfortable level of earnings is indicated for 1975, although considerably below the \$5.35 a share of 1974. The company has no fixed dividend policy; dividends totaling \$0.45 a share were paid in the past 12 months.

RECENT DEVELOPMENTS

In November 1974, Alleghany made a tender offer for MSL Industries Inc., common stock at \$50 a share, and acquired 75% at an aggregate cost of \$58.5 million. The acquisition was accounted for as a purchase, and operations were consolidated commencing January 1, 1975. MSL, a Chicago-based maker of industrial fasteners, motors, and other products had earnings of \$12.2 million in 1974, up 56% from the prior year. In July, 1975, Alleghany announced plans to merge MSL Industries and to make it a 100%-owned unit. Minority holders of 56,000 MSL shares would receive \$50 a share for their stock, the same price as the original tender offer.

DIVIDEND DATA

Payments in the past 12 months were:

Am't of Div'd	Date	Ex-div'd Date	Stock of Record	Payment Date
0.25...	Nov. 12	Nov. 26	Dec. 3	Dec. 13 '74
0.20...	May 14	May 22	May 29	Jun. 9 '75

*Listed N.Y.S.E.; also traded Boston, PBW, Pittsburgh, Midwest, Detroit, Cincinnati and Pacific S.E.s; warrants listed A.S.E. and traded Pacific S.E. *Paid in the past 12 mos. *Based on com. shs. & com. sh. equivalents; incl. security transactions. *Excl. earnings of USM Corp. *Deficit.

STANDARD N.Y.S.E. STOCK REPORTS

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Published at: Ephrata, Pa. Editorial & Executive Offices, 345 Hudson St., New York, N.Y. 10014

Vol. 42, No. 170

Wednesday, September 3, 1975

Sec. 2

ALLEGHANY CORPORATION

'INCOME STATISTICS (Million \$) AND PER SHARE (\$) DATA

Year Ended Dec. 31	Motor Carrier Revs.	% Oper. Inc. of Revs.	Oper. Inc. of Revs.	Degr. & Amort.	Other Income Net	Net Bef. Tax	*Net Income	*Earnings	—Common Share (\$) Data—	Price Range	Earnings Ratio HI LO
1975—	—	—	—	—	—	—	—	—	0.20	11 1/4 - 6 1/2	2-1
1974—	84.60	6.4	5.43	4.66	46.45	47.22	43.54	5.35	0.45	12 1/2 - 6 1/2	12-7
1973—	86.28	6.0	5.18	4.37	11.55	12.35	10.21	1.19	0.36 1/4	14 1/2 - 7 1/2	12-7
1972—	86.28	6.2	5.36	3.46	10.45	12.35	10.21	1.19	0.36 1/4	14 1/2 - 7 1/2	11-7
1971—	77.54	7.0	5.41	3.20	12.66	14.87	11.83	1.30	0.28 3/8	14 1/2 - 9 1/2	14-8
1970—	63.70	8.2	5.25	3.08	10.13	12.30	9.89	1.13	0.20	18 1/2 - 9 1/2	31-10
1969—	57.72	3.6	2.06	3.13	4.41	3.33	3.74	0.44	0.20	13 1/2 - 4 1/2	34-13
1968—	57.72	3.6	2.06	3.13	4.41	3.33	3.74	0.44	0.20	13 1/2 - 4 1/2	50-21
1967—	57.72	3.6	2.06	3.13	4.41	3.33	3.74	0.44	0.20	13 1/2 - 4 1/2	35-19
1966—	57.11	8.8	5.00	3.13	5.43	7.30	7.00	0.83	0.20	16 1/2 - 7 1/2	60-27

'PERTINENT BALANCE SHEET STATISTICS (Million \$)

Dec. 31	Total Assets	*Gross Prop.	Control. Afili.	Mkt. Secs.	Cash Items	Inven-tories	Receiv-ables	Current Assets	—Current Liabls.	Net Workg. Cap.	Long Term Debt	Shrholders' Equity	Bk. Vol. Com. Sh.
1974—	254.0	100.4	87.5	11.2	16.4	33.6	23.8	80.8	25.6	55.2	34.03	169.1	19.50
†1973—	182.4	83.7	84.2	15.6	25.4	0.5	6.7	35.3	17.1	18.2	13.94	130.0	15.42

*Data for 1973 as originally reported; data for each yr. prior to 1973 as taken from subsequent yr.'s Annual Report; in 1974 changed from an investment co. to an operating co., consolidating Jones Motor. †Based on com. & com. sh. equivalents. *Bef. spec. crs. of \$0.03 a sh. in 1971 & \$0.10 in 1969; incl. security profits. *Capital expend. (in millions) were: \$7.44 in 1974 & \$7.93 in 1973. †Restated for comparability (see footnote 1 & text). Note: Pro-forma earnings to reflect acq. MSL Industries were \$6.21 a sh. in 1974 & \$1.44 in 1973.

Fundamental Position

Alleghany Corp. is regulated by the ICC as a motor-carrier because of its Jones Motor division, although other investment interests constitute a dominant factor. During 1974, the company underwent a substantial change from a company that had the apparent attributes of an investment company to one with the characteristics of an operating company. During 1974, a 95% interest was acquired in MSL Industries Inc., and holdings in Missouri Pacific Railroad and USM Corp. were sold. MSL is a diversified company engaged in the manufacture and distribution of a number of products used largely by other manufacturers. The company's steel products include nuts, bolts, fasteners, washers, tubing, steel lamination and fractional horsepower motors. Alleghany Corp. owns 29% of the equity and 45% of the voting stock of Investors Diversified Services through holdings of 495,815 Class A and 6,313,660 Class B common shares. At December 31, 1974, other marketable securities owned by the company had a cost of \$21.6 million, and an indicated market value of \$23.6 million.

Investors Diversified Services is the national distributor and investment manager for seven associated mutual funds. Investment objectives of these funds range from achievement of regular interest and dividend income to relatively high-risk capital growth. Its 4,000-man national sales organization is the exclusive distributor of these mutual funds as well as face-amount investment certificates.

Alleghany Corp. owns 29% of the equity and 45% of the voting stock of Investors Diversified Services. (Therefore Alleghany controls In. Div. S.) Investor's Diversified Services is the nat'l. Distributor and investment manager for seven associated Mutual Funds. (Alleghany free from SEC) Its 4,000 man national sales organization is the exclusive distributor of these mutual funds.

IDS entered into two other investment management services in 1972 IDS Realty Trust and IDS Advisory Corp. IDS Advisory Corp. provides investment management services to pension and profit-sharing plans.

Alleghany also owns a real estate complex in Denver, Col., known as Court House Square. Book value of land and buildings is \$10.5 million.

Common shareholders: 8,325.

Finance

In December, 1971 the company entered into a \$30 million seven-year standby-credit, term loan agreement.

CAPITALIZATION

LONG TERM DEBT: \$34,025,501.
COMMON STOCK: 7,829,610 shs. (\$1 par); Kirby family owns about 49%.
PERPETUAL WARRANTS: 481,190 to purchase common at \$3.75. (Terms and trading basis should be checked in detail.)

Please Note. Fundamental Position.

Alleghany Corp. is regulated by the I.C.C. as a motor carrier because of it Jones Motor Division. (Therefore exempt from SEC regulation-by 3(c)(9) of it Jones Motor Division. (Therefore Alleghany controls In. Div. S.) Investor's Diversified Services is the nat'l. Distributor and investment manager for seven associated Mutual Funds. (Alleghany free from SEC) Its 4,000 man national sales organization is the exclusive distributor of these mutual funds.

President of Alleghany is F.M. Kirby. F.M. Kirby is the Chairman, A.P. Kirby Jr. is a director. (Alleghany controls In. Div. S.) Alleghany is regulated by the ICC as a motor carrier, and by reason of Section 3(c)(9) of the Act, has ceased to be an investment company. Therefore the SEC does not regulate Alleghany under the Federal Securities Laws. The ICC in its present posture, is incapable of protecting the interests of public investors. The ICC is not concerned about investor protection, even for I. Div. S.

Incorporated in Md. in 1929. Office—350 Park Ave., NYC 10022. Pres.—F.M. Kirby, VP—Secy.—Treas.—J. C. Horton. Dir.—F.M. Kirby (Chairman), J. J. Burns, Jr., R. K. Gottshall, R. R. Hough, A. P. Kirby Jr., W. G. Rabe, C. J. Routh, J. E. Tabin, S. A. Zimmerman. Transfer Agents—Chemical Bank, NYC; Central National Bank of Cleveland. Registrars—Manufacturers Hanover Trust Co., NYC; Cleveland Trust Co., Cleveland.

Information has been obtained from sources believed to be reliable, but its accuracy and completeness, and that of the opinions based thereon, are not guaranteed. Printed in U.S.A.

INADEQUACIES OF PROTECTIONS FOR
INVESTORS IN PENN CENTRAL AND OTHER
ICC-REGULATED COMPANIES

STAFF STUDY

FOR THE

SPECIAL SUBCOMMITTEE ON INVESTIGATIONS

OF THE

COMMITTEE ON
INTERSTATE AND FOREIGN COMMERCE
HOUSE OF REPRESENTATIVES

(92d Congress)



HOUSE OF REPRESENTATIVES,
SPECIAL SUBCOMMITTEE ON INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., July 27, 1971.

HON. HARLEY O. STAGGERS,
Chairman, Special Subcommittee on Investigations, House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: It is my pleasure to forward to the subcommittee the study of "Inadequacies of Protections for Investors in Penn Central and Other ICC Regulated Companies." As you pointed out in directing this staff study, few, if any, events in the recent history of our Nation have had as significant and alarming an impact upon our economy as the announcement of the bankruptcy of the Penn Central Transportation Co.

While many disparate factors contributed to the collapse, because of the subcommittee's legislative oversight responsibilities the question arose of the adequacy of the Interstate Commerce Act and the Federal securities laws. This study is, therefore, expressly limited to the single public interest issue of the effectiveness of the Interstate Commerce Commission (hereinafter referred to as ICC) in protecting investors.

Our review has drawn the staff to the ineluctable conclusion that the ICC, in its present posture, is incapable of protecting the interests of public investors. Each one of the Federal securities laws, which would otherwise safeguard investors, contains an exemption for the securities of carriers regulated by the ICC. The result is a significant diminution in protection for persons investing in those securities. In this era of concern for consumer protection, it is no longer defensible or desirable that the 100,000 stockholders, who each owned less than 100 shares of Penn Central stock, should be deprived of those protections and safeguards which Congress has long deemed essential. The remedy to the disparate treatment accorded to investors in rail and motor carriers is simple: the elimination of each and every exemption from the Federal securities laws for carriers regulated by the ICC.

In recommending this modification of the Federal securities laws, this study has taken careful note of the experience of public utilities subject to the jurisdiction of the Federal Power Commission. The economic regulation by that agency has not been impeded by the concurrent jurisdiction of the Securities and Exchange Commission (hereinafter referred to as SEC) over the securities of those utilities. Rather, more effective protections to consumers and to investors have been achieved.

The ICC has assured the subcommittee that it is concerned about investor protection. The record shows otherwise. In 1933 Congress

(III)

passed the first of the Federal securities laws and therein set forth certain minimum requirements which it considered essential for disclosure in a prospectus. In the 38 years since the passage of that legislation, the ICC, although it had the statutory power and moral responsibility to do so, has refrained from promulgating a single disclosure requirement for inclusion in a prospectus.

On June 24, 1970, a high-ranking official of the ICC testified that he was taken by surprise at the bankruptcy of the Penn Central Railroad. Certainly, a report-collecting regulator who is forced to make this admission either does not read the reports he elicits or, having read them, does not comprehend their import. In either case, he is scarcely in a position to protect the interests of public investors who must rely upon the accuracy of those reports.

In 1920, Congress gave the ICC the legislative authority it requested to prohibit "every interstate railroad * * * from spending money, or incurring liability, or acquiring property not in the operation of its railroad." Yet this is exactly what the Penn Central Railroad has done. Other major carriers, such as the Chicago & Northwestern Railroad, have followed suit. In spite of the clear legislative mandate in 1920, the ICC claims it lacks the very jurisdiction it requested which was granted in the very form it was requested.

Rail and motor carriers have found the ICC is a marvelous device to evade the Federal securities laws. Although the ICC has regulatory authority delegated to it by Congress which could prevent this evasion, it has not once exercised this authority. The largest mutual fund complex in the world is controlled by a "motor carrier." This "motor carrier" has only 12.5 percent of its assets invested in a motor carrier. Twenty percent of its assets are invested in the fourth largest bank in the United States. It also controls nearly \$7 billion in mutual fund assets and owns a stock brokerage house. Because the ICC has deigned to call it a "motor carrier," this company is exempt from regulation by the SEC.

In 1939 Congress held extensive hearings and enacted legislation to protect bondholders against specific abuses. Those abuses have been eliminated in every area except bonds of rail and motor carriers. The list of deficiencies is endless. The record of the ICC is a shocking chronicle of bureaucratic disregard for the intent of Congress and for the protection of the public.

It is, therefore, the recommendation of this study that the jurisdiction of the ICC over securities be curtailed as outlined above so that rail and motor carriers may be put on an equal footing with every other company attempting to raise and manage money in the capital markets.

Respectfully submitted,

MICHAEL F. BARRETT, Jr.,
Attorney.

carriers subject to its jurisdiction. Its failure to do so is another example of its lack of concern for the protection of investors.

VII. INVESTMENT COMPANY ACT OF 1940

A. BACKGROUND

The Securities Act of 1933 and the Securities Exchange Act of 1934 were essentially designed to protect investments by the public in traditional types of securities—those which are issued by commercial and industrial corporations and publicly traded either on the stock exchanges or in the over-the-counter market. The full disclosure requirements and the antifraud provisions of both Acts, however, have proven to be insufficient protections for investors who contribute their funds to the large liquid pools of cash which are employed in the securities markets through investment companies. The Investment Company Act of 1940, which is essentially a Federal law of trusts, regulates in great detail the activities of companies engaged primarily in the business of investing, reinvesting and trading in securities and whose own securities are offered and sold to and held by the investing public.

Investment companies, as such, are a progressive form of the holding company; i.e., a company authorized to own the securities of other companies. Ironically, the earliest holding companies in the United States which by special acts of incorporation were granted the right to own securities of other companies were railroads. Thus, the Baltimore & Ohio Railroad Company, reputedly the first commercial railroad in the United States, became in 1832 or 1833 the first parent securities company in this country when it acquired nearly two-thirds of the stock of the Washington Branch Road.⁷⁵

Use of the holding company, especially by railroads, as a device to control large enterprises; became increasingly popular toward the close of the nineteenth century. Thereafter, the investment company, as a logical extension and refinement of the holding company, was developed. The speculative frenzy of the 1920s precipitated the rapid increase in investment companies until the stock market debacle of 1929.

During the course of the Congressional hearings which led to the passage of the Securities Act of 1933 and the Securities Exchange Act of 1934, the disclosures of the participation of investment companies in various market manipulations and investor frauds highlighted the need for additional regulation directed toward the particular problems then existing in the investment company industry. The comparative ease with which the liquid assets of investment companies could be misused and their assets diverted, combined with the lack of any governmental regulation, attracted brokers, investment bankers, securities salesmen and others who saw opportunities for ready personal profits to be derived from the substantial assets in cash and securities held by investment companies. By the time the Investment Company Act was passed, the American public contributed roughly \$7 billion to the investment company industry and incurred a capital shrinkage of approximately \$3 billion attributable in substantial part to mismanagement, looting and a host of other improper practices.⁷⁶

⁷⁵ Report on Investment Trusts and Investment Companies of the Securities and Exchange Commission, pt. 1, at 48 (1939).

⁷⁶ Hearings on S. 3539 (Investment Trusts and Investment Companies) Before a Subcommittee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess. 34 (1940).

Recognizing the scope of the problem and the need for legislative changes, in 1935 the Congress directed the SEC to conduct

a study of the functions and activities of investment trusts and investment companies, the corporate structures, and investment policies of such trusts and companies, the influence exerted by such trusts and companies upon companies in which they are interested, and the influence exerted by interests affiliated with the management of such trusts and companies upon their investment policies * * * ⁸⁰

The long, detailed study which followed resulted in the passage of the Investment Company Act of 1940. The Act itself was passed before a substantial portion of the study was finally reported to the Congress in 1941.

B. INVESTMENT COMPANIES DEFINED

The definition of an investment company includes both those companies which hold themselves out as being investment companies (i.e., engaged primarily in the business of investing, reinvesting, or trading in securities)⁸¹ and those companies which do not formally admit to being investment companies but at least 40 percent of whose assets are in investment securities.⁸² For the purposes of this latter definition, investment securities generally include all securities except government securities and those of majority-owned subsidiaries. If a corporation has 40 percent or more of its assets in investment securities, then it is presumed to be an investment company and the corporation must affirmatively establish that it is not in the business of investing, reinvesting, owning, holding or trading in securities. This 40 percent standard has resulted in many corporations becoming "inadvertent investment companies" and subject to the restrictions and regulation of the Investment Company Act.⁸³ Many conglomerates, unless they are actually participants in the decisional management of their subsidiaries, might find themselves to be inadvertent investment companies.⁸⁴

The traditional form of investment company is the closed-end company. This is a holding company with a substantial portion of its assets invested in the securities of companies it does not control. Aside from the character of its business which is largely directed toward investing in securities, it is otherwise similar in structure and organization to other publicly-held corporations. At present, the more commonly encountered form of investment company is the open-end company or "mutual fund" which represents its willingness to redeem its securities in cash upon demand. Because of the operative restrictions inherent in open-end companies as a result of various statutory provisions, such companies are not useful investment vehicles for rail and motor carriers and, therefore, have been omitted from this analysis.

⁸⁰ Section 30, Public Utility Holding Company Act of 1935.

⁸¹ Section 3(a)(1), Investment Company Act of 1940.

⁸² Section 3(a)(3).

⁸³ See Kerr, *The Inadvertent Investment Company: Section 5(a)(5) of the Investment Company Act*, 12 Stanford L. Rev. 29 (1959); Kerr and Appelbaum, *Inadvertent Investment Companies—Ten Years After*, 25 Business Lawyer 887 (April 1970).

⁸⁴ See, e.g., Feurstein, *The SEC Viewpoint as to Disclosure*, 25 Business Lawyer 813, 819 (January 1970).
⁸⁵ Query: What happens when a company, such as U.S. Industries, declares its corporate policy to be one of being companies but retaining original management and not interfering with operational decisions?

C. ABUSIVE PRACTICES

The Investment Company Act specifically refers to the SEC reports and to the many practices which were found to be adverse to the public interest and to the interest of investors. Among the practices which the Act sought to eliminate or to mitigate were:

1. inadequate, inaccurate or unclear disclosure with respect to the investment company and its securities;
2. self-dealing by management or its affiliates;
3. issuance of securities upon inequitable or discriminatory terms; failure to protect the privileges and preferences of outstanding security holders;
4. improper concentration of management control through pyramiding and other practices; irresponsible management;
5. unsound or misleading accounting practices which were not subject to adequate independent scrutiny;
6. reorganizations, changes in investment policies and transfer of control without shareholder consent;
7. excessive borrowing and excessive issuance of senior securities which unduly increased the speculative character of the junior securities; and
8. operation without adequate assets or reserves.⁸⁵

D. REMEDIAL PROVISIONS OF THE INVESTMENT COMPANY ACT

The Investment Company Act has sought to protect investors against these abuses in the following respects:

1. *Responsible management.*—The Act prohibits persons convicted within 10 years of a crime, or enjoined by a court, in connection with a security or financial fraud from participating in management; provides for a certain amount of "independence" in the management; prohibits directors from serving unless elected by security holders subject to certain limited exceptions; outlaws provisions in the organizational instruments of investment companies that purport to exculpate the management for willful misfeasance, bad faith, gross negligence or reckless disregard of duty; and makes embezzlement of investment company assets a Federal crime.

2. *Transactions with Management.*—The Act prohibits affiliated persons and principal underwriters from selling property to, or purchasing or borrowing property from, an investment company. Any transaction involving self-dealing requires the investment company to apply to the SEC for an order exempting the proposed transaction and the SEC must find the transaction meets the standards of fairness and of consistency with the stated policy of the investment company and the purposes of the Act. Upstream loans are prohibited and remuneration to affiliated agents and brokers is limited.

3. *Inequitable Treatment of Security Holders.*—Investment companies may not issue securities for services or for property other than cash or securities. Stockholder approval is required before an investment company may alter its investment policy as set forth in its organizational instruments.

4. *Unsound Structures and Securities.*—The Act strictly curtails excessive borrowing and top-heavy senior security structures which might give management disproportionate control. Similar limitations

⁸⁵ Section 1(b).

apply to cross and circular ownership, pyramiding, dividend restrictions on new securities, and issuance of warrants.

5. *Disclosure and Accounting Practices.*—A detailed registration statement must be filed containing the same information and documents required under the Securities Act and Securities Exchange Act and certain other information peculiar to investment companies. Annual, semi-annual and quarterly reports must be filed with the SEC. Investors must be furnished semi-annual reports, and the source of dividend payments must be disclosed. The SEC has promulgated detailed rules and regulations concerning financial statements, maintenance of books and records and proxy solicitations.

E. EXEMPTION FOR ICC CARRIERS

The holding company was an especially utile device for conducting railroad operations because it permitted retention of legislative grants of rights of way.⁸⁶ It was also particularly attractive to the investment banking community because it facilitated acquisition of control over railroading enterprises, permitted concealment of self-dealing and generated incredible amounts of paper wealth wholly unrelated to the underlying value of the railroad's assets and earnings.⁸⁷ Of course, once the holding company was created it was a logical progression to advance from holding securities of railroads for purposes of integrating their operations to holding securities of non-railroad companies solely for purposes of investment.

So long as railroad holding companies limited their operations to railroading, there seemed to be no need for including them within the Investment Company Act. After all, the ICC had asserted in 1913 that if it were given jurisdiction to regulate securities issuances of carriers it could put a stop to the then current process of railroads engaging in non-rail business.⁸⁸ That jurisdiction, which was granted in 1920, together with the Emergency Railroad Transportation Act of 1933 subjecting railroad holding companies to ICC regulation, were assumed to be adequate protection against ICC-regulated carriers actively engaging in the investment company business.⁸⁹

It was against this background that Section 3(c)(9) of the Investment Company Act of 1940 excluded from the definition of an investment company subject to the Act—

Any company subject to regulation under the Interstate Commerce Act, or any company whose entire outstanding capital stock is owned or controlled by such a company.

The latter half of this exemption carries the further proviso—

That the assets of the controlled company consist substantially of securities issued by companies which are subject to regulation under the Interstate Commerce Act.

This proviso is particularly significant because the apparent purpose of Section 3(c)(9) was to exempt operating railroads which would have been exempted pursuant to another provision of the Act.⁹⁰ The

⁸⁶ Those grants, in many cases, might have reverted to the grantor government upon a railroad's acquisition by a merger into a larger railroad.

⁸⁷ See *History of ICC Regulation of Securities*, *supra*.

⁸⁸ The New England Investigation, 27 I.C.C. 550, 616 (1913).

⁸⁹ See *Hearings on the Securities Act Amendments, 1959 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 408-09 (1959).

⁹⁰ Section 3(b).

proviso makes it abundantly clear that the legislative drafters of Section 3(c)(9) intended the Investment Company Act to apply to an investment company owned by a rail carrier if the investment company had public stockholders. Evasion of the limiting proviso of the section has been readily accomplished by obtaining an order from the ICC declaring that the investment company itself is a carrier rather than a company owned or controlled by a carrier.

As will be seen from the examples included in the following sections, the effect of this evasion has not been to the benefit of investors. The ICC asserts that it lacks regulatory jurisdiction over conglomerate holding companies beyond the component transportation company.⁹¹ It also asserts it lacks jurisdiction to regulate non-carrier investments of regulated transportation companies.⁹² Thus, the action of the ICC in declaring an investment company to be a carrier, thereby exempting that company from SEC regulation and protection, at the same time it itself admits it lacks adequate regulatory control is indefensible as against investors and the public interest. Any assertion by the ICC that it lacks jurisdiction is especially specious because the power to authorize securities issuances must, preforce, include the inherent power to condition such issuances upon the carrier's submission to standards imposed by law in each one of the Federal securities laws.⁹³ The ICC does not so much lack jurisdiction as the imagination to assert its inherent Congressionally delegated powers.

F. EXEMPT CARRIER INVESTMENT COMPANIES

1. Pennsylvania Company

The Penn Central Company is the publicly-held parent holding company which owned 100 per cent of the outstanding shares of Penn Central Transportation Company, the railroad operating company. The railroad, in turn, owned 100 per cent of the common stock of the Pennsylvania Company. The preferred stock of the Pennsylvania Company was listed and traded on the New York Stock Exchange.

One of the first and most prominent issues to arise early in the staff's study of the Penn Central complex was the applicability of the Investment Company Act of 1940 to the Pennsylvania Company. The Pennsylvania Company had been the issuer which in April 1970 proposed to issue \$100 million in sinking fund debentures.⁹⁴ In its preliminary prospectus, the company (which referred to itself as Pennco) made the following representations:

Pennco operates as an investment company, with its principal interests in companies not directly related to the railroad operations of the Penn Central system * * *⁹⁵

From 1963 through 1968 Pennco significantly increased its holdings of non-railroad securities * * * Penn Central which controls Pennco, has recently made and expects to continue to make investments in non-railroad securities.⁹⁶

⁹¹ Hearings on "Emergency Rail Services Legislation" before the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 217, 1101 et seq. (1970).

⁹² *Id.* at 223.

⁹³ The Commission has on occasion, conditioned a security issue upon a carrier's submission to additional regulation. See, e.g., Greyhound Corporation Securities, Finance Docket No. 26456, May 14, 1970.

⁹⁴ The inability to market these debentures marked the final stage in the railroad's decline and precipitated massive dumping of Penn Central's securities by those corporate insiders who were privy to this information.

⁹⁵ Preliminary Offering Circular of the Pennsylvania Company, dated April 27, 1970, at p. 3.

⁹⁶ *Ibid.*

Pennco operates as an investment company. On December 31, 1969, the book value of total assets of the Company was \$598.9 million, of which investments represented by stocks, bonds and other indebtedness amounted to \$570.6 million (95.3 per cent of total assets). Of this \$570.6 million, stocks and bonds were \$548.0 million (91.5 per cent of total assets).⁹⁷

These and other representations by the company, including testimony before the House Committee on Interstate and Foreign Commerce, made it abundantly clear that the Pennsylvania Company was convinced it was an investment company, not an operating railroad. Section 3(a)(1) of the Investment Company Act of 1940 defines an "investment company" to mean any company which "is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities."

It was against this background that on July 1, 1970 Chairman Staggers solicited from the Chairman of the SEC an opinion:

Whether the Pennsylvania Company may be an "investment company" within the meaning of Section 3(a)(1) of the Investment Company Act and, if so, whether it should be so registered with your Commission.

On July 15, 1970, Chairman Budge advised the Subcommittee that:

It is the staff's tentative view based on the limited information presently available to us and set forth in the Preliminary Circular that there is a question as to whether the Pennsylvania Company is an investment company within the meaning of the Act.

Thereafter, on September 16, Chairman Budge transmitted a supplemental memorandum which concluded:

* * * that it appears that Pennsylvania Company is able to rely on the exclusion provided by Section 3(c)(9) of the Investment Company Act for a company subject to regulation under the Interstate Commerce Act.

During the course of its analysis, the SEC had determined that as of July 1, 1970 approximately 45.8 percent of the Pennsylvania Company's investments were in investment securities. That fact alone, without regard to the company's representations, would have raised an issue of the applicability of the Act.

The Act was found to be not applicable because the ICC in 1942 had ordered the Company to be considered a carrier subject to the provisions of Sections 20 and 20a of the Interstate Commerce Act.⁹⁸ This order was specifically based on the company's control of the Wabash Railroad Company. In March of 1970, the Pennsylvania Company disposed of its controlling position in the Wabash Railroad. Despite this action, the company remained exempt from the Investment Company Act because the terms of the 1942 order expressly provided that:

* * * unless and until otherwise ordered by this Commission, said Pennsylvania Company shall be considered as a carrier subject to the provisions of Section 20(1) to (10),

⁹⁷ *Id.* at p. 8.
Wabash Railroad Company Control, 247 I.C.C. 365, 252 I.C.C. 319.

inclusive, and Section 20a(2) to (11), inclusive, of the Interstate Commerce Act * * *

The ICC has not "otherwise ordered,"⁹⁹

If the Investment Company Act had been determined to be applicable to the Pennsylvania Company, all of the following prohibitions of the Act would have been specifically violated:

1. transactions between affiliates without the prior approval of the SEC, especially transactions involving the transfer of assets;
2. excessive management compensation;
3. improper allocation of expenses between parent and subsidiary company;
4. loans to a parent holding company by a subsidiary;
5. guaranty by a subsidiary of loans made to the parent holding company by a third party;
6. sale of securities without prior approval of the SEC;
7. issue of senior securities such as preferred stock; and
8. issue of excessive debt.¹⁰⁰

Needless to say, each and every one of these prohibitions was violated, but the activity was not unlawful because the Investment Company Act was determined to be not applicable. The Investment Company Act was passed to prevent exactly the abuses witnessed in the Penn Central situation. In retrospect, it must be concluded that the regulation of the ICC has been woefully inadequate with consequent injury to investors and to the traveling public.

2. Alleghany Corporation

More than any other single instance, the Alleghany Corporation highlights the "overlapping and underlapping" of jurisdiction over investment companies under the Investment Company Act of 1940 and the Interstate Commerce Act. Between 1956 and 1959 the SEC vigorously but unsuccessfully sought to extend its regulatory jurisdiction pursuant to the Investment Company Act over Alleghany Corporation. The exemption provided by Section 3(c)(9) and the order of the ICC that Alleghany was a carrier effectively thwarted the SEC in its endeavors. After the Supreme Court had determined that Alleghany should not be subjected to the conflicting jurisdiction of two regulatory agencies and that the statutory jurisdiction of the ICC appeared paramount, legislation was proposed to close the loophole. In appearing to oppose this legislation, counsel for Alleghany argued that the proposed legislation was, in effect, a bill of attainder because Alleghany was the only company which would be affected. Whether or not such was the case in 1959, there are enough companies besides Alleghany presently relying on Section 3(c)(9) to warrant closing this loophole.¹⁰¹

Alleghany was incorporated on January 26, 1929. It became one of the first companies to register with the SEC under the Investment Company Act of 1940 and it continued to be subject to the Act until

⁹⁹ It should be pointed out, however, that although the disposal of the Wahash could have been a basis for rescinding the 1942 order, the Pennsylvania Company continued to control the Detroit, Toledo & Ironton Railroad Company and the Toledo, Peoria and Western Railroad Company, both common carriers by railroad.

¹⁰⁰ Hearing on "Penn Central Transportation Company: Adequacy of Investor Protection" before the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 109-120 (1970).

¹⁰¹ For example, International Utilities Corporation, which was represented on the Board of Directors of Penn Central, obtained an order terminating its status as an investment company subject to the Investment Company Act of 1940 as a result of its acquisition in 1963 of R.R. Truck Lines. SEC Investment Company Act Releases Nos. 4306 and 4325.

October 4, 1945. At that time, the SEC terminated Alleghany's registration as an investment company because as a result of its acquisition of control of Chesapeake and Ohio Railway Company it "had become subject to regulation under the Interstate Commerce Act and had thus ceased to be an investment company by reason of Section 3(c)(9) of the Act which excludes from the definition of investment company any company subject to regulation under the Interstate Commerce Act."

At that time, 86 percent of Alleghany's total assets of \$83 million were invested in securities of carriers and only about 5 percent in securities of non-carrier issuers.

In 1949, Alleghany acquired control of Investors Diversified Services, which is now the largest mutual fund complex in the United States with assets in excess of \$6 billion. In 1955, Alleghany acquired control of the New York Central Railroad but continued its policy of investing in non-ICC regulated securities so that by 1959 only 22 percent of its assets were invested in carriers. This policy, interestingly enough, has included a significant investment in Manufacturers Hanover Trust Co.

Following the completion of the Penn Central merger on February 1, 1968, Alleghany and its related interests constituted the single largest block of stockholdings in Penn Central's common stock.¹⁰² Thereafter, Alleghany asserted it continued to hold carrier status until that status was revoked by the ICC and, therefore, it considered itself excluded from the definition of an investment company by reason of Section 3(c)(9). Recognizing, however, it was no longer in control of a carrier, Alleghany registered with the SEC as an investment company on April 10, 1968. It stated in its registration statement that it was registering under the Act to eliminate any uncertainty that might exist as to its status as a company subject to regulation under the Interstate Commerce Act and to eliminate any possibility of liability for doing business as an unregistered investment company.

Alleghany then embarked upon a series of transactions intended to remove the company from under the provisions of the Investment Company Act. On September 4, 1968, Alleghany entered into an agreement whereby it bought virtually all of the outstanding stock of Jones Motor Co., Inc., a motor carrier subject to ICC regulation. Because the transaction required ICC approval, all the shares of Jones purchased by Alleghany were deposited in a voting trust with Marine Midland Grace Trust Co. of New York as "independent voting trustee."

In registering with the SEC, Alleghany had disclosed its intention to assume motor carrier status, but did not solicit and receive stockholder approval until April 25, 1969. Thus, approval was obtained only after Alleghany had already made its investment. Certainly, a question of effective stockholder approval is raised in view of the SEC's position in *The Equity Corporation*.¹⁰³

On January 27, 1970 the ICC authorized Alleghany to acquire Jones and the transaction was consummated on April 30, 1970. The ICC found that Alleghany's acquisition of control had clearly violated Section 5(4) of the Interstate Commerce Act but, nevertheless, found the acquisition to be "in the public interest." As in several other

¹⁰² As of April 3, 1969, Alleghany, its controlling stockholder and Investors Diversified Services had a combined holding of 10.1 percent of Penn Central stock and formed the largest single block.

¹⁰³ SEC Investment Company Act Release No. 6900.

similar situations, the ICC chose to overlook action by a carrier which might reasonably have been construed to be at least a misdemeanor under Section 10 of its Act. It rewarded the carrier for violating the Interstate Commerce Act by permitting it to retain an investment made in violation of law. Of course, at no point in its consideration of the acquisition did the ICC consider the effect upon investors because of a loss of regulatory control by the SEC. This illicit acquisition cost Allegheny approximately \$28.8 million. On a consolidated basis, this represented approximately 12.5 percent of its total assets, but it was sufficient to permit Allegheny to slip from under the regulatory controls of the SEC and fall within the pseudo-regulation of the ICC.

VIII. OTHER MATTERS AFFECTING INVESTOR SECURITY

In analyzing the adequacy of investor protections, as viewed by the ICC, the staff has concluded that because of their potential for injury to the public interest, certain other matters should properly be the subject of separate and more detailed study. Those matters include:

1. CONGLOMERATES

In March, 1969 the staff of the ICC submitted to the Commission detailed studies of the conglomerate merger activity within the rail and motor carrier industries. Among other things, the staff pointed to the Commission's power inherent in Section 20a as a potent means for controlling what was becoming a rapidly accelerating process of diversification. In this regard, the staff raised the point that—

✓ Management [of the conglomerate] may very well strip the carrier of additional assets reducing it to a corporate shell and then dispose of it.

Ironically, the accuracy of this estimate has already been brought home with the announcement by Northwest Industries of its intention to dispose of its transportation subsidiary, the Chicago and Northwestern Railway. The railroad had been the initial company around which the holding company was capitalized and launched. Northwest Industries, as the parent holding company has availed itself of the tax benefits and credits of the subsidiary railroad to reduce its own tax liabilities without, apparently, any offsetting benefit to the railroad. Now, with a significant portion of the railroad's real estate investments sold off to maintain the company's dividend policy and the bulk of the tax advantages already written off, the railroad is for sale.

Although the ICC has prepared its conglomerate merger studies, it has not demonstrated an enthusiasm for implementing the staff's recommendations. ✓ The Commission sought and received in the Emergency Railroad Transportation Act of 1933 the authority to regulate holding companies, but when actually confronted with a patent violation of a significant prohibition in that legislation, it ignored the original legislative purpose and ratified the unlawful action.

Clearer public disclosures by conglomerates with intelligible and accurate breakdowns of gross and net incomes by product lines and lines of business are needed. ✓ A reporting system for conglomerates

that reflects the true utilization of assets and the actual employment of stockholders' equity is needed.

2. COMMODITIES CLAUSE

Pursuant to Section 1(8) of the Interstate Commerce Act, it is unlawful for a railroad to ship in interstate commerce—

any article or commodity * * * manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of business as a common carrier.

In the case of a conglomerate holding company with a subsidiary which also controls a manufacturing subsidiary, a serious question arises as to the applicability of the "commodities clause." Thus, for example, Northwest Industries has significant affiliated interests in the chemical and wearing apparel industries. Whether those affiliates actually ship by the Chicago and Northwestern Railway is not presently known. While the enforceability of the prohibition is subject to some doubt, the increasing role of conglomerates within the carrier industry, both rail and motor, requires a current overall analysis of the commodities clause with a view to possible legislative changes.

3. RATIFICATION OF ILLEGAL ACTS

As the Allegheny application demonstrated, the ICC is not adverse to ratifying an action which may not be proper within the Interstate Commerce Act simply because it is presented to the Commission as a fait accompli. In the Greyhound Corporation Securities decision, the ICC was faced with a situation in which in order to further its program of diversification, Greyhound had exceeded the Commission's standard for an acceptable working capital ratio and in the process unreasonably encumbered the carrier's operating equipment. Greyhound sought ratification of the completed transaction. As the Commission itself observed—

Greyhound Lines * * * finds itself in a situation where its working capital is depleted by advances to affiliates, and its bus equipment encumbered essentially for the purpose of permitting applicant to expand at a greater rate into non-carrier investments. We find this situation not to be in the interest of Greyhound Lines, since it could in a financial squeeze seriously impair the carrier's ability to perform its service, and for other reasons as well, including good financial practice, is not consistent with the public interest.

Nevertheless, the Commission permitted, with restrictive conditions, activity which it found "not consistent with the public interest" because requiring Greyhound to set aside the questionable transaction would have caused a loss on investment of approximately \$58 million. The reluctance of the agency to set aside a questionable investment decision if the transaction has been completed and only ratification